93-945

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PETROCHEM INSULATION, INC.,

Petitioner,

v.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, DISTRICT COUNCIL 51 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, AND 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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December 15, 1993

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QUESTIONS PRESENTED

1. Does Plaintiff state sufficient facts to allege a violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. Sec. 1, 2, by way of "sham petitioning" under this Court's recent decision of *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, __ U.S. __, 113 S. Ct. 1920 (1993), when Plaintiff alleges the dates and details of a scheme by union groups to obtain agreements between owners of projects (who are not engaged in the construction industry and have no collective bargaining relationship with the union group), the union groups and union signatory contractors by which those owners agree to cease doing business (refuse to deal) with non-union contractors as a *quid pro quo* for the union groups not bringing or not pursuing permit or other environmental objections which are not meritorious otherwise?

2. Is an allegation of unlawful combination between four union contractors and the vast majority of the entire market set of owners to substantially reduce the number of competitors in a nine member market, the consideration for which anticompetitive agreement is a promise by unions to forbear from sham petitioning of environmental and building permit agencies, sufficient to allege an injury to competition under Section One of the Sherman Antitrust Act, and, if not, does such an allegation of an anticompetitive agreement supported by consideration of forbearing from sham petitioning have such an unmistakable anticompetitive impact without redeeming social value sufficient to allege a *per se* violation of Section One of the Sherman Act under the *Noerr-Pennington* doctrine?

QUESTIONS PRESENTED - Continued

3. Should the rule of pleading announced by the United States Court of Appeals for the Ninth Circuit in *Loux v. Rhay*, 375 F.2d 55 (9th Cir. 1967), which holds that a party who amends its complaint, whether or not voluntarily, is prohibited from appealing the dismissal of claims raised in the original complaint which are not included in the amended complaint, even when the party is told under threat of sanction not to include its prior theory in the amended complaint, be reversed because it is inconsistent with the principles of the Federal Rules of Civil Procedure and the law of every other federal circuit court that has addressed the issue?

4. Does the very object of environmental and permit petitioning, which is an unlawful agreement between non-construction industry owners and union signatory contractors to cease doing business with non-union contractors, a result that cannot possibly be achieved in that permit or environmental forum and which agreement violates Section 8(e) of the National Labor Relations Act, 29 U.S.C. Sec. 158(e), coupled with heavy advertising to warn others that the petitioning will continue regardless of the merits of the underlying dispute, state a cause of action for sham petitioning under the *Noerr-Pennington* doctrine *per se*, and if not, what facts in addition to those already specified in the Petitioner's Second Amended Complaint (Appendix E, *infra*) must be pleaded to state such a claim sufficient to survive a motion to dismiss under Federal Rule of Civil Procedure 12 (b)(6)?

LIST OF PARTIES

The parties to the proceeding below and before this Court are:

1) Petrochem Insulation, Inc.;

2) Northern California and Northern Nevada Pipe Trades Council, District Council 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO;

3) United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO;

4) Local Unions 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662;

5) Thomas R. Adams;

6) Thomas R. Adams, P.C.;

7) Adams & Broadwell, P.C.;

8) Thomas J. Hunter.

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In The
Supreme Court of the United States
October Term, 1993

No. _____

Petrochem Insulation, Inc.,
Petitioner,

v.

Northern California and Northern Nevada Pipe Trades Council, District Council 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; Local Unions 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662; Thomas R. Adams; Thomas R. Adams, P.C.; Adams & Broadwell, P.C.; and Thomas J. Hunter,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petrochem Insulation, Inc. respectfully prays that a Writ of Certiorari issue to review the Opinion of United States Court of Appeals for the Ninth Circuited entered in this proceeding on September 24, 1993.

OPINIONS BELOW

The unpublished Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*), filed September 24, 1993, is recorded at D.C. No. CV-90-03628 (9th Cir., Sept. 24, 1993). The opinion of the United States District Court for the Northern District of California (Appendix B, *infra*) filed March 19, 1992, is recorded at __ F.Supp__, 1992 U.S. Dist. LEXIS 4564, 139 L.R.R.M. 2956 (N.D. Cal. 1992).

JURISDICTION

The Judgment and Opinion of the three judge panel of the United States Court of Appeals for the Ninth Circuit was entered on September 24, 1993. A timely Motion for Reconsideration En Banc was filed by Petitioner on October 8, 1993 pursuant to Federal Rule of Appellate Procedure 35 (b). The Court of Appeals for the Ninth Circuit issued an Order on November 19, 1993, denying Petitioner's Motion for Reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1). This Petition is timely filed with this Court under 28 U.S.C. Sec. 2101 (c) and Supreme Court Rule 13 (1).

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Section 8 (e), 29 U.S.C. Section 158 (e).

B. Federal Rules of Civil Procedure 8, 8 (a)(2), 8 (f), 9 and 12 (b)(6).

C. Sherman Antitrust Act, 15 U.S.C. Sections 1 and 2.

STATEMENT OF THE CASE

Petrochem Insulation, Inc., is a California Corporation with its principal place of business in Vallejo, California. Petrochem is a mechanical insulation contractor specializing in power plant and industrial construction. It is not a signatory to any collective bargaining agreements. Nor has Petrochem recognized any labor organization as the majority representative of its employees.

Respondents Northern California and North Nevada Pipe Trades Council, District Council 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, is a labor organization with its headquarters in Burlingame, California. District council 51 is an unincorporated association whose members include the Locals.

Respondents Locals 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, and 503 are all labor organizations with headquarters throughout Northern California as described in Petrochem Insulation's Seconded Amended Complaint (Appendix E, *infra*), paragraphs 10-28.

Respondent Tom Adams is an individual residing in or near San Mateo, California. Mr. Adams is the President and sole

shareholder of Thomas R. Adams, P.C. and an officer of Adams & Broadwell.

Respondent Thomas R. Adams, P.C. is a California professional law corporation with its principal place of business at Adams & Broadwell, P.C., in San Mateo, California. Thomas R. Adams, P.C. is a shareholder in Adams & Broadwell.

Respondent Adams & Broadwell is a California professional law corporation with its principal place of business in San Mateo, California.

Respondent Tom Hunter is an individual residing in Belmont, California. Mr. Hunter is the business manager of District Council 51.

This case results from the appeal from the grant of a motion to dismiss the Petitioner's second amended complaint under Federal Rule of Civil Procedure 12 (b)(6) for failure to state a claim in a detailed forty page complaint.[1] The complaint alleged sham petitioning by Respondent unions in combination with Petitioner's competitors to force owners and developers, not engaged in the construction industry, to enter into agreements to cease doing business with all non-signatory contractors like Petitioner, or face environmental objections and administrative intervention designed to delay and undertaken solely to interfere with free competition, always without the expectation that this petitioning would result in any environmental improvements. This scheme of "environmental extortion" is the Respondents'

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[1] The complaint, attached as Appendix E to this Petition, consists of 112 paragraphs, is forty pages long, and incorporates by reference three exhibits to the complaint. Exhibit 1 to the Complaint was the complete transcript of the fifty minute video in which defendants boast of their successes of continued sham petitioning. (Appendix F, *infra*). Exhibit 2 was an article entitled "Participation in the Permit Process," wherein the Respondents announced their intentions to use the promise to withdraw or not file permit objections as the means to coerce "hot cargo" contracts. (Appendix G, *infra*). Exhibit 3 to the Complaint was a union publication entitled "California Pipe Trades Protecting The Environment," which contained party admissions as well as an overview of the entire scheme of coercing union-only agreements by threatening to file permit objections, all the while purportedly in a effort to protect the environment. (Appendix H, *infra*).

attempt to increase their economic power in an increasingly competitive market and by Respondents' own admission, eliminate these non-signatory competitors from the market, a plan which Respondents claim has been very successful in capturing most of the energy related projects within the Northern California geographic market.

In the mid-1980s, the insulation contractors with whom the Respondents had collective bargaining agreements were losing work to lower priced, non-signatory competitors, like the Petitioner. In or about 1987, the Respondents developed a plan for destroying nonunion competition by using and threatening to use the environmental objection process to coerce union only agreements from large project developers. (Appendix E, Complaint, paragraphs 35-74.) Respondents' scheme, referred to by Respondents as the "Tom Adams Program," was to target project owners and developers who required various permits to begin or continue their construction projects and to threaten delay by permit objections unless the developers agreed to use only union signatory contractors (Petitioner's competitors who constitute approximately half the firms in the market.)

As a result of the "Tom Adams Program" and similar activity by the Respondents, Petitioner suffered damages and competition in the market was injured by the loss of approximately half the competing firms.

In response to these damages, Petitioner filed a detailed complaint in the United States District Court for the Northern District of California under the Racketeering and Corrupt Organizations Act [18 U.S.C. Secs. 1961 et seq.], and the Hobbs Act [18 U.S.C. Secs. 1951 et seq] because the Petitioner believed the Respondents conduct was extortive and economically coercive under the plain meaning of the Hobbs Act (as well as a violation of the Sherman Act [15 U.S.C. Secs. 1, 2]). The District Court had proper jurisdiction over the subject matter of the case under 28 U.S.C. Secs. 1331 and 1337. The District

Court dismissed this first complaint (with prejudice), but allowed leave to amend under an antitrust theory.[2]

Petitioner's First Amended complaint was met with the court's decision that Petitioner must meet a heightened pleading standard because First Amendment considerations require evidentiary details beyond the notice pleading standards articulated in the Federal Rules of Civil Procedure.

Petitioner filed a Second Amended Complaint in the district court on September 3, 1991. The district court also dismissed this complaint and issued an opinion which is found at __ F.Supp__, 1992 U.S. Dist. LEXIS 4564, 139 L.R.R.M. 2956 (N.D. Cal. 1992).

Petitioner appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals for the Ninth Circuit had proper jurisdiction to hear the appeal under 28 U.S.C. Sec. 1291. In affirming the district court's decision, the Ninth Circuit ruled that Petrochem had not adequately pleaded a violation of Section One of the Sherman Antitrust Act. Specifically, the court ruled that Petitioner had not properly pleaded an "injury to competition." The Ninth Circuit rejected each of Petrochem's arguments that it had in fact done so, reasoning that Petrochem had only pleaded an injury to one competitor, itself, which did not necessarily equal an injury to competition. The Ninth Circuit held that the Union's activity, even if evidence of anticompetitive intent, was protected under the *Noerr-Pennington* doctrine. Furthermore, the court ruled

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[2] Petrochem's original complaint was dismissed without leave to amend the RICO cause of action. One of the Questions Presented in this Petition is whether the Ninth Circuit's rule that required Petrochem to immediately appeal that dismissal before filing the amended complaint that contained the antitrust causes of action (pursuant to the district court's order) or face waiver of the RICO action is correct. Although Petrochem moved for either an amendment of its original complaint, or an order for certification of the RICO ruling, the Ninth Circuit court denied each of these requests. The District Court also ordered Petitioner's trial counsel, under implied threat of sanction, not to re-allege the first RICO theory in any amended complaint even though Petitioner's counsel argued to do so would preserve the record on appeal.

that since the charges of sham petitioning amounted only to unilateral action, they could not form the basis of a Section 1 claim. The Ninth Circuit filed its Opinion and Judgment on September 24, 1993. Petitioner filed a timely Motion for Reconsideration En Banc on October 8, 1993. This Motion was denied by the Ninth Circuit on November 19, 1993.

In addition to the litigation involving the second amended complaint, Petitioner also sought review of the district court's order denying the motion to amend the original complaint to include the RICO cause of action. Respondent's Motion to Dismiss the Appeal was granted in part by the circuit court on August 6, 1993, relying on this circuit's rule of pleading announced in *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Petitioner again requested en banc review of this circuit's rule of pleading, which was denied on November 19, 1993. (*See* Appendix C, *infra*).

REASONS FOR GRANTING THE WRIT

In addition to the important and fundamental issues of pleading that this case presents, the underlying controversy presents an issue of national importance and public policy: Should unions be able to unlawfully magnify their economic force in the marketplace by instituting a practice of exchanging permit or environmental objections for hot cargo agreements? By their own admission, Respondents are labor unions or the agents of labor unions, who regularly file or threaten to file permit objections, regardless of merit, against owners and developers who use nonunion construction contractors. Respondents, frankly and openly, engage in this activity and even produce a videotape that advertises their plan as a direct threat to other owners considering using non-signatory construction contractors. These practices have an unmistakable anticompetitive effect because it forces project owners to sign hot cargo agreements, agreements to use only signatory contractors while excluding from the market those competitors who are not signatory

contractors.[3] Petitioner alleges that the Respondents' practice is violative of Section One of the Sherman Antitrust Act as an unreasonable restraint on trade.

In the district court complaint, Petitioner described in detail the offending behavior, its impact on both the Petitioner and on competition in the Petitioner's market, and attached the Respondents' admissions in this regard as exhibits to the complaint. While it remains to be seen whether Petitioner can prove its allegations, Petitioner was not even allowed to get past the pleading stage. Although recent Supreme Court decisions have addressed the main issues in this case, namely the requirements for adequately pleading a violation of Section One of the Sherman Act under *Summit Health, Ltd. v. Pinhas*, __ U.S. __, 111 S Ct. 1842 (1991), and the requirements for proving litigation is a sham under *Professional Real Estate Investors v. Columbia Pictures*, __ U.S. __, 113 S. Ct. 1920 (1993), there remain unanswered questions of law and procedure regarding these causes of action. There is confusion concerning the proper method of alleging an injury to competition, and there is no real standard for pleading sham litigation.

In this case, Petitioner contends the sham petitioning is based upon both the repetitive and meritless petitions filed, the advertising to others customers in the market that the Unions will continue this practice regardless of success to punish those who don't use union contractors, and finally the agreement sought itself is unlawful, an agreement between "stranger" unions and non-construction owners to use only union signatory contractors, a clear violation of this Court's decision in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). Literally

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[3] Despite the construction industry exception for pre-hire agreements contained in 29 U.S.C. 158(f), it is still unlawful for employers in the construction industry to become signatory if their employees have affirmatively indicated a desire to not belong to the union. *See, Mid-West Piping Inc.*, 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945); Hardin, *The Developing Labor Law*, 1992, p. 309-17 (explaining development of neutrality rule under *Midwest Piping*.)

billions of dollars of time sensitive projects, mostly in the energy co-generation field nationwide, are impacted by this conduct. Finally, the imposition of an agenda of union agreements in exchange for environmental permit forbearance is inherently destructive of the environmental hearing process since valid objections are "bought off" in exchange for union agreements, and meritless objections are pursued for anticompetitive, rather than environmental, reasons. Because the effects of Respondents' "Blue Print for the Future" type of anticompetitive conduct and sham petitioning are of national significance, Petitioner prays that this Court grant the Writ of Certiorari in order to immediately resolve these issues.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THIS COURT SHOULD SPECIFY THE REQUIREMENTS FOR PLEADING INJURY TO COMPETITION AFTER THE CASE OF *SUMMIT HEALTH V. PINHAS*, __ U.S. __, 111 S. CT. 1842 (1991).

On May 28, 1991, this Court announced the rule of *Summit Health v. Pinhas*, __ U.S. __, 111 S. Ct. 1842, for pleading injury to competition under Section One of the Sherman Antitrust Act. In *Pinhas* this Court clearly stated that "in a civil action under the Sherman Act, liability may be established by proof of *either an unlawful purpose or an anticompetitive effect*." *Id.* at 1847, citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978) (emphasis supplied). The crucial question left open by *Pinhas* is whether a plaintiff, in order to successfully state an injury to competition, still needs to plead facts that demonstrate anticompetitive effects within the relevant market when the plaintiff sufficiently pleads an anticompetitive and unlawful purpose to the defendants actions, and specifically, what facts does Plaintiff need to plead anticompetitive effects.

Although *Pinhas* is a case about federal jurisdiction, the rule allowing a plaintiff to plead an injury to competition through a showing of anticompetitive intent is only sensible. Under the federal antitrust laws, criminal liability can be shown by anticompetitive intent alone, even if the conspiracy is a failure. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Since civil liability follows from any business injury "by reason of anything forbidden in the antitrust laws" (15 U.S.C. Sec. 15), it follows that civil liability may also be established by intent alone, provided that the plaintiff is itself injured as a result of acts taken in furtherance of that intent. Accordingly, *Pinhas* stands for this proposition. And although the Ninth Circuit completely ignored the standard for pleading an injury to competition under *Pinhas*, it has been used by courts for this reason in a case raising the same issue. *See Carleton v. Vermont Dairy Herd Improvement Ass'n, Inc.*, 782 F.Supp. 926, 933-34 (D.Vt. 1991).

As this Court in *Pinhas* pointed out, the essence of a Section 1 claim is the illegal agreement itself, rather than any overt acts performed in furtherance of it. *Pinhas*, 111 S. Ct. at 1847. Thus, liability may be established not only by demonstrating an unreasonable restraint on trade, but by demonstrating an anticompetitive purpose. In the present case, Petitioner more than adequately plead an anticompetitive purpose. (Appendix E, Complaint, paragraphs 39-74). Furthermore, such purpose is evident from Respondents' own script, which was attached as Exhibit One to the Petitioner's Second Amended Complaint in the district court. (Appendix F, *infra*.) Accordingly, the Court of Appeals for the Ninth Circuit erred in affirming the district court's dismissal of the claim because Petitioner Petrochem adequately pleaded injury to competition, or an intent to inflict such injury.

Instead of addressing the *Pinhas* standard for pleading an injury to competition in the present case, the Ninth Circuit relied on older cases that require a formalistic application of the

antitrust laws. Specifically, the Ninth Circuit ruled that "[i]ndespensable to any section 1 claim is an allegation that *competition* has been injured rather than merely competitors." *Petrochem Insulation*, D.C. No. CV-90-03628- EFL, p.2, citing *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987) (emphasis in original). While this may be a valid requirement, it does not resolve the problem of *pleading* an injury to competition

In the present case, Petitioner does not challenge the rule that an injury to competition is usually necessary to state a claim for violation of Section One of the Sherman Act. However, since the issue here is not proof but rather pleading, the crucial question that is left unanswered by the Ninth Circuit is how a plaintiff goes about alleging an "injury to competition." The Ninth Circuit cites *Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) for the proposition that elimination of competitors does not equal injury to market competition. This is not a hard and fast rule, but rather depends on the size of the market. In a small market with a small number of competitors, such as the one pleaded here, elimination of even one competitor is an injury to competition. *Les Shockley Racing*, 884 F.2d at 508-509; *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988). As the Ninth Circuit stated in *Les Shockley*: "Of course, convergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discreet and the market participants are few." *Les Shockley*, 884 F.2d at 508-09.

In the case below, Petitioner Petrochem Insulation pleaded facts which, if allowed to prove, would show that the defendants' actions sought to eliminate four out of nine members of the relevant market. (*See* Appendix E, Complaint.) In *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988), the Ninth Circuit found an injury to competition when the exclusion of a single nurse anesthetist from the relevant market reduced the number of competitors from five to four. *Id.* at 1440. In the

present case, Petitioner alleged a forty-five percent reduction in the number of subcontractors in the relevant market. (Appendix E, Complaint, paragraphs 35-39.)

In addition, Petitioner defined almost all the projects within the market during the last two years in paragraphs 37 and 38 of the Second Amended Complaint (Appendix E, *infra*), and then alleges, as Respondents' proudly boast, that the "vast majority of which" were performed by union contractors (and not the four non-union contractors) as a result of Respondents' agreements between owners, itself and union contractors. Perhaps it is possible that barriers to entry into the market are so low that elimination of four of nine competitors has no effect. However, this is a factual issue, and Petitioner was not allowed to advance even beyond the pleading stage. Thus, speculation concerning unpleaded and unproved facts cannot justify dismissal of the complaint. It is enough at this point that one reasonable inference from the complaint is that competition has been harmed.

Here, Petitioner alleges it was or would have been the low bidder on at least four projects, but was precluded from doing the work by Respondents' conspiracy. (Appendix E, Complaint, paras. 54, 55, 61, 74.) The Ninth Circuit Court of Appeals was confronted with very similar facts in *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024 (9th Cir. 1989), *aff'd*, __ U.S. __, 111 S.Ct. 1842 (1991), and found that the plaintiff, Dr. Pinhas, had adequately plead an injury to competition:

> Pinhas alleges in his complaint that the conspiracy was intended to boycott his attempts at providing patients with lower prices as a result of his ability to perform operations at a rate quicker that that of his competitors. Assuming Pinhas's allegation that he provides his services at a rate cheaper than that of his competitors to be true, the preclusion of Pinhas from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services. Or Pinhas may show that his preclusion otherwise substantially reduced total competition in the market. We therefore conclude that Pinhas has adequately pleaded injury to competition.

Pinhas, 894 F.2d at 1032.

Certainly it is true that antitrust injury may be inferred from economic data showing decreased output or increased price, as the district court and Ninth Circuit in this proceeding apparently would have preferred. However, it is *not* true that a plaintiff must produce this data at the pleading stage. *Carleton v. Vermont Dairy Herd Improvement Ass'n, Inc.* 782 F.Supp. 926, 933 (D.Vt. 1991) (declining to dismiss rule of reason boycott claim for lack of economic data). As the Ninth Circuit stated in *Pinhas*, "injury to competitors may be probative of harm to competition." *Pinhas*, 894 F.2d at 1032. In this case, but for Respondents' acts, at least four major developers would have awarded bids to Petitioner Petrochem Insulation. (Appendix E, Complaint, paragraphs 55, 61, 74.) In other cases, developers suffered increased costs and decreased options from project delays or the threat of delay. In each case, the developers were deprived of the freedom of independent economic choice which the antitrust laws were designed to protect. Indeed, it is precisely such deprivation of free economic choice that allows a court to condemn a practice as a *per se* violation of the antitrust laws. *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 350 U.S. 207, 210-14 (1959).

The confusion surrounding the requirements for pleading an injury to competition must be resolved so that competitors who are injured by violations of Section One of the Sherman Antitrust Act can properly plead their case and at least have the opportunity to conduct discovery.[4] The present case involving

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[4] At least one court has held that allegations of sham litigation constitute a "per se" violation of Section 1 of the Sherman Act, relieving the plaintiff of the need to plead an injury to competition. *See El Cajon Cinemas, Inc. v. American Multi-Cinema, Inc. et al.*, 1993 WL 406744 (S.D. Cal. 1993) (" . . . sham litigation is a per se violation of the antitrust laws, for there is no redeeming value to the practice. Therefore, there is no requirement that AMC and Pacific prove an anticompetitive effect upon a defined relevant market.) The "heightened pleading standard" must not be applied to the non-first amendment parts of the complaint, only to the allegations

Petitioner Petrochem Insulation is just one example of the problem that litigants face when the pleading standards are unclear and applied inconsistently. The Federal Rules of Civil Procedure require specific pleading only in cases of capacity, fraud, mistake, condition of mind, conditions precedent, official document of act, judgment, and time and place. Fed. R. Civ. Pro. 9. None of these situations are implicated in the present case. And even though the Petitioner was not faced with a case of fraud or another Rule 9 exception, the Petitioner's second amended complaint consists of over one hundred paragraphs of facts, two exhibits and a prayer for relief. (Appendix E, Complaint, *infra*). What else does the Ninth Circuit require? This was not a motion for summary judgment, but a motion under Fed. R. Civ. Pro. 12 (b)(6). If nothing else, it is clear that the federal district courts need guidance in determining and identifying when a litigant has adequately plead an injury to competition.

II. THE NINTH CIRCUIT'S RULE THAT SHAM LITIGATION CANNOT BE EVIDENCE OF ANTICOMPETITIVE INTENT NECESSARY TO ALLEGE A VIOLATION OF SECTION ONE OF THE SHERMAN ACT IS ERROR BECAUSE NO CLEAR STANDARD EXISTS FOR PLEADING SHAM LITIGATION.

Although this Court's recent decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, __ U.S. __, 113 S. Ct. 1920 (1993) announced a new standard for *proving* that litigation is a "sham," the Court's decision did not address any meaningful standard for the proper way to *plead* an allegation of sham litigation.

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of sham petitioning. Here, the Ninth Circuit does not find lack of specific reference to sham petitioning (*See* Exhibit E, Complaint, paragraph 47, 55, 59, 63, 65, 66, 75, 76-80), but with the non-first amendment requirement of pleading injury to competition.

In *Professional Real Estate Investors* this Court required that if a plaintiff were to succeed on its claim that defendant's litigation was a "sham," the plaintiff must first show that the litigation is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 1928. Upon a successful demonstration that the questioned litigation is objectively baseless, a court "may examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere directly with the business relationships of a competitor,' through the 'use of the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon.'" *Id.*, citing *Columbia v. Omni Outdoor Advertising*, 499 U.S. at --, 111 S. Ct. 1344 (slip op., at 14) (1991). The Court specifically declined to address the issue of whether this same test would require an antitrust plaintiff to plead, as a threshold prerequisite, that a sham lawsuit is baseless as a matter of law.[5]

Additionally, the Petitioner in this case does not argue that evidence of anticompetitive intent or purpose alone should transform otherwise legitimate activity into a sham. Indeed, this proposition was expressly rejected in *Professional Real Estate Investors*. Instead, Petitioner alleges an independent wrongful object of the Respondents' conduct of obtaining agreements with owners, who are not engaged in the construction industry and who have no relationship with Respondents, to use only union signatory contractors rather than competitively bid these projects. This agreement violates both the provisions of Section 8(e) of the

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[5] "PRE contends that 'the Ninth Circuit erred in holding that an antitrust plaintiff must, as a threshold prerequisite ..., establish that a sham lawsuit is baseless as a matter of law.' Brief for Petitioners 14. It invites us to adopt an approach under which either 'indifference to ... outcome,' ibid., or failure to prove that a petition for redress of grievances 'would ... have been brought but for [a] predatory motive,' Tr. of Oral Arg. 10, would expose a defendant to antitrust liability under the sham exception. We decline PRE's invitation." *Professional Real Estate Investors, Inc.*, 113 S. Ct. at 1925-26.

National Labor Relations Act and Section 1 of the Sherman Act under this Court's decision in *Connell v. Plumbers Local 100*, 421 U.S. 616 (1975).[6]

As this Court explained in *Connell*, "this agreement [between a union and contractor not to use nonunion subcontractors], which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract with Local 100, may be the basis of a federal antitrust suit because it has the potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." *Connell Constr. Co.*, 421 U.S. at 635. Taking into account the acts of sham petitioning and the nature of the economic threats alleged by Petitioner in this case, the *Connell* Court's conclusion is equally applicable here that "the methods the union chose [to obtain 8(e) agreements] are not immune from antitrust sanctions simply because the goal is legal." *Connell Constr. Co.*, 421 U.S. at 625. Likewise, an otherwise unlawful agreement combined with evidence of sham litigation as its consideration should be sufficient to allow a plaintiff to adequately plead an anticompetitive intent or purpose under Section One of the Sherman Act as described in *Summit Health v. Pinhas*. Clearly, unlawful conduct can not become lawful when it is accompanied or effectuated by sham petitioning.

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[6] Subsequent cases dealing with the limitation of the construction industry proviso to Section 8(e) like *Wolke and Romero Framing, Inc.v. NLRB*, 465 U.S. 645 (1982) and its progeny are not relevant when the owners are clearly alleged not to be engaged in the construction industry and have no other relationship with the union. Prehire agreements are unlawful outside the construction industry. Of course, it is a matter of fact whether some or all of these owners fall within or without the construction industry proviso, but for pleading purposes, it was specifically alleged that owners like Chevron, Allied Signal, and others are not in the construction industry. (*See* Exhibit E, Complaint, paragraphs 71, 76, 79.) Unless they directly hire construction workers, project owners are *not* engaged in the construction industry for purposes of the National Labor Relations Act. *See Longs Drug Stores, Inc.*, 278 N.L.R.B. 440 (1986); *The Kroeger Company*, 163 N.L.R.B. No. 59 (1965).

A. The Scheme Of Union Groups Of Filing Environmental Objections In The Permit Process In Order to Obtain Illegal Hot Cargo Agreements Is Not The Type Of Petitioning That Warrants Protection Under The *Noerr-Pennington* Doctrine Because the Agreement Between Owners Not Engaged In The Construction Industry And Unions To Cease Doing Business With Non-Union Contractors Is Unlawful Under The National Labor Relations Act And This Court's Doctrine Of *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975).

"Although those who petition the government for redress are generally immune from antitrust liability, *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, such immunity is withheld when petitioning activity `ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with a competitor's business relationships.'" *Professional Real Estate Investors, Inc. at al. v. Columbia Pictures Industries, Inc. et al.*, __ U.S. __, 113 S. Ct. 1920 (1993). The present case raises the important issue of whether or not the *Noerr-Pennington* doctrine of "Sham Petitioning" can be applied to an attempt by Unions, in combination with signatory contractors, to file (and/or threaten to file) baseless environmental and permit objections, in exchange for agreements by project owners (not engaged in the construction industry) to cease doing business with non-signatory contractors. This issue has received national attention, both in the regular media and in law review articles such as the Comment: *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 Cal. L. Rev. 757 (May, 1992), by Daralyn J. Durie and Mark A. Lemley.

With the passage of the Clean Fuels Act, there are literally billions of dollars of construction that is now subject to environmental extortion, which limits competition to signatory

construction firms (less than half of the existing number of competitors). As the Summary of the above law review article states:

> "Opposing permit applications on environmental or regulatory grounds is one strategy labor unions have used to eliminate competing non-union contractors. Job owners who refuse to use union labor can find their projects blocked entirely or their costs increased significantly if their permits are challenged. The authority argues that unions pursuit of litigation or permit interference against projects using nonunion contractors as a means of driving competitors out of business violates the antitrust laws. The primary objective of such union strategy is anticompetitive and bears no reflection to the stated objectives of the threatened litigation or interference. While the labor exemption and the *Noerr-Pennington* immunity limit the application of the antitrust laws to cases of this type . . . unions can be held accountable to attempts to coerce market participants [to use union contractors] by monopolization or group boycotts."

Id. at 757. In the present case, the Respondents have and continue to follow just such a practice. Indeed, the Petitioner's second amended complaint contained a complete transcript of a videotape produced by Respondents that openly boasts the success of this scheme, known as the "Tom Adams Program." (*See* Exhibit F, *infra*).

According to the Respondents' video, the very object of the petitioning activity is to obtain illegal agreements between non-construction industry employers to cease doing business with or refuse to deal with non-union contractors, thus interfering directly in the business of the developers so as to obtain agreements requiring the use of union contractors. This was made explicit and unmistakable in the transcript of the Respondents' videotape describing the Tom Adams Program. According to the Respondents, as explained in their video tape:

> Our deal has always been that if you're going to build, whatever it is your going to build or whatever your going to do, you're going to do it union or you're not going to do it at all. Years ago we were able to do that by using picket lines and other -- through the National Labor Relations Board. Through politics. We've sort of lost that. So what we are now doing is, we are doing the same thing that we did in the past except we're using a different way of doing it.

(Appendix F, p.83a) (emphasis added).

By pursuing baseless permit and environmental objections, the Unions seek to use the threat of delay and the loose forum of the permit process to extort agreements from owners to cease doing business (refusal to deal or group boycott) with the competitors of union contractors, thereby reducing the market to half its present participants.[7] Respondents state that they are not interested in the outcome of any environmental objections they may file, since no environmental agency can legally require a developer to enter into an agreement to cease doing business with non-signatory contractors. As the videotape further explains, in regard to one particular intervention at a project involving a developer Allied Signal (a non-construction industry employer):

> What the [Allied Signal] fight did for us was that it showed these other industrial users that we were not going to quit. That -- because they must have known, as we knew when we were half way through the fight we had a loser. Our deal then was to keep on fighting and to

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[7] Under the National Labor Relations Board's doctrine in *MidWest Piping Inc.*, 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945), it is still unlawful for Petrochem and other non-signatory contractors to sign union agreements when the employees have clearly indicated they do not wish representation. This is especially true in cases where the contractor's employees are represented by either an independent union, or a union not part of the AFL-CIO Building Trades Department, as is the case with the Communication Workers of America representing employees in the low voltage section of the electrical construction industry, the Teamsters and Steelworkers representing some contractors employees or other similar cases.

> make everybody understand that that was the deal with us. That there was no -- that there was simply no end to it. We would just keep on fighting.

(Appendix F, p.92a-93a).

Hence, regardless of the merits of the intervention, Respondents would forge ahead to show, not only that this developer (Allied Signal), but others, that the Respondents were capable of using and abusing the process to harass such project owners indefinitely. In most cases, Respondents would lack standing to assert any meritorious claim. *See, Lujan v. Defenders of Wildlife*, __ U.S. __, 112 S. Ct. 2130 (1992). In short, Respondents used *the process itself*, not the potential outcome of any government action, to secure agreements which violated the antitrust and labor laws.

Indeed, most of the environmental objections made by the unions during the permitting process were withdrawn or not filed once the developer agreed to use Petitioner's competitors instead of Petitioner. Many of the other examples in the videotape involved no environmental objections at all, but merely the threat of repeating what Respondents had done to Allied Signal. This was so, even though both Respondents and developers "must have known . . . we had a loser." (Appendix F, p.92a).The threat to which the developers responded was not the threat of government action, but the threat of abuse of process. The danger to developers is not that the unions will prevail in their opposition to the contended permit, but, as the videotape declares, "that we simply will not stop." (Appendix F, p.101a). This pattern is repeated again and again as evidenced in the videotape. (Appendix F, pp.92a-98a). Thus, in the end, the environmental objections made by the unions during the permitting process have no relation to any legitimate goal of the union. Instead, the union participates in the permit process to get only what can be described as a pay-off or protection money -- a ransom to move the project out of the permit phase only if the

developer agrees to exclusively deal with union signatory contractors and to boycott the non-union contractors.

By participating in the permit procedure and submitting groundless and sham petitions, the union is attempting to use the governmental process as compensation for their waning influence in the modern industrial marketplace. Although Respondents are entitled to First Amendment freedoms, this type of behavior is consistent with this Court's definition of "sham" litigation, and therefore does not warrant First Amendment protection under the Noerr-Pennington Doctrine.

In *Professional Real Estate*, this Court described a sham as "evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims," "private action that is not genuinely aimed at procuring favorable government action," and as "a pattern of repetitive, baseless claims." *Professional Real Estate*, 113 S. Ct. at 1927, citing various authorities. While not necessarily focusing on the subjective intent alone, each of these standards seeks to curb an abuse of the petitioning and adjudicative process that tends to interfere with a defendant's right to due process and fair application of the laws. As such, each one of these descriptions could fairly describe the activity in which the Respondents have engaged here.

In the present case, the Ninth Circuit seemed to address this issue when it stated: "the *Noerr-Pennington* doctrine shields legitimate efforts to use the adjudicative or the legislative process to achieve certain goals from antitrust liability regardless of anticompetitive intent or purpose." *Petrochem Insulation, Inc. v. United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO, et al.*, D.C. No. CV-90-03628-EFL, p.3 (9th Cir. 1993) (emphasis original). Although the Ninth Circuit was correct to point out that subjective intentions are not to control the finding of whether or not particular actions fall within the sham exception to the Noerr doctrine, the court begs the question of whether the Unions' activity is legitimate to begin with. But before even that, this

Court must remember that this is a pleading case - in the opinion below the Ninth Circuit has effectively required that in order to plead a "sham litigation" allegation, the plaintiff must plead ultimate facts of injury to competition that are unavailable at the pleading stage of trial. The specific sham is adequately pleaded, it is only the surrounding elements of common antitrust liability that now must be alleged with specifically, according to the Ninth Circuit Court of Appeals.

B. Requiring An Increased Level Of Specificity In Pleading Injury To Competition In A Section One Antitrust Claim Is Contrary To Prior Decisions Of This Court And The Principles Of The Federal Rules Of Civil Procedure, Or, In The Alternative, Plaintiff Has Met Every Reasonable Standard Of Pleading Under Federal Rule Of Civil Procedure 8.

The overarching purpose of the Sherman Antitrust Law is to promote competition through making illegal certain agreements and actions that tend to unnaturally restrain competition. In passing the Sherman Act in 1890, Congress "meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dryers, Inc. v. Unites States*, 286 U.S. 427, 435 (1932). Furthermore, "[t]he Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. et al. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Thus, one of the primary underlying purposes of the Sherman Antitrust Act is to protect market participants who fall victim to forbidden practices in restraint of trade.

The Supreme Court's application of the Sherman Antitrust Act has followed this general principle. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). In this regard, the Court

has recently reiterated the policy of flexibility in dealing with antitrust issues when it stated: "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Eastman Kodak Company v. Image Technical Services, Inc. et al.*, __ U.S. __, 112 S. Ct. 2072 (1992), quoting *Maple Flooring Mfrs Ass'n v. United States*, 268 U.S. 563, 579 (1925).

In the present case, the Court is faced with just this type of controversy. The Petitioner filed a lawsuit against the Respondents alleging violations of the Sherman Act, Section 1 and 2, as well as a RICO cause of action. As part of the original forty page complaint, Petitioner included the transcript of fifty minute videotape produced by the Respondents in which the Respondents expressly, openly and notoriously agreed to combine with Petitioner's competitors to force project owners and developers to enter into agreements banning nonunion subcontractors. (Appendix E, Complaint, paragraphs 39-45.) Despite the long and explicit factual material provided by the Petitioner, the Ninth Circuit Court of Appeals held that Petitioner failed to state a claim upon which relief can be granted under Section 1 of the Sherman Act because Petitioner did not allege sufficient facts.

However, the Ninth Circuit has also stated that "no special rule requires more factual specificity in antitrust pleadings" than are required under FRCP 8(a)(2). *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980). Similarly, the Ninth Circuit has held that if a question is raised regarding the illegality of a conspiracy, that question should not be decided from the face of a pleading where the pleading alleges a conspiracy, unreasonable competition and direct injury to the plaintiff. *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963).

The Ninth Circuit Court of Appeals drifted away from these principles in this case, however, by holding Petitioner to a pleading standard that so far has not been required in the federal system. In its decision affirming the district court, the Ninth Circuit stated that "intent to harm competition in the relevant market may state a claim for relief in certain circumstances, conclusory allegation are insufficient in the absence of anticompetitive conduct from which specific intent may be inferred." *Petrochem Insulation*, D.C. No. CV-90-03628-EFL at 3, citing *Rutman Wine Co.*, 829 F.2d at 735. While not explaining under what circumstances the Ninth Circuit *would* allow a showing of anticompetitive intent to state an antitrust claim, the Ninth Circuit's ruling ignores the detailed and specific allegations of the Petitioner's complaint. Petitioner Petrochem not only provided a highly fact specific complaint to the district court, but included a transcript of a videotape produced by the Respondents which announces their intention to harm competition through a scheme of sham petitioning and claiming success. Far from conclusory, these facts adequately demonstrate the unions' intention to injure competition, its success at harming competition, and thus its violation of the Sherman Antitrust Act.

The important question in this case is the degree of specificity and particularity that courts require under the Federal Rules of Civil Procedure in order for a plaintiff to get past even the initial stages of a lawsuit. Although Federal Rule of Civil Procedure 8 (a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," the Ninth Circuit now seeks to increase that standard by requiring a heightened burden of pleading for Petitioner under the claim that the federal antitrust laws require specific facts unavailable to Petitioner at the initial stages of the lawsuit, indeed even before discovery. Nowhere in the Federal Rules is the requirement stated that a plaintiff set out detailed facts giving the basis for the claim. Rather, the short and plain statement need only give the defendant fair notice "of the claim" and the "grounds upon which

it rests." *Conley v. Gibson*, 344 U.S. 41, 43 (1957). Broad opportunities for discovery, which serve to narrow the issues and more precisely delineate the factual basis of a claim, make notice pleading possible. *Id.*

No complaint should be dismissed for failure to state a claim under Fed. R. Civ. P. 12 (b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* At 102. And, when construing pleadings the court must construe them "as to do substantial justice." Fed. R. Civ. P. 8(f). The long-standing rule of this Court is that a complaint should not be found insufficient unless it is "wholly frivolous." *Radovich v. National Football League*, 352 U.S. 445, 453 (1957). There is no variance in the rules for antitrust cases. The factual specificity in an antitrust complaint need be no greater than that required by *Conley*. *Portland Retail Druggists Ass'n. V. Kaiser Foundation Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981). The allegations need only be sufficient to meet the liberal pleading requirements of Rule 8 (a)(2). *Datagate Inc. V. Hewlett Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1667 (1992).

Additionally, when antitrust claims are made against a union, the pleading standards still do not vary. The plaintiff is only required to make a short, plain statement as required by Fed. R. Civ. Proc. 8 (a)(2), and the complaint will not be dismissed unless there is no set of facts that would support the allegations. *Bodine Produce, Inc. V. United Farm Workers Organizing Committee*, 494 F.2d 541, 556 (9th Cir. 1974). The courts should have tolerance for claims for relief and a correlating intolerance regarding motions to dismiss. *Id.*

Petitioner in this case has met every reasonable pleading burden under the Federal Rules of Civil Procedure. Petitioner attached significant supporting documentation with the Second Amended Complaint. One attached document was a transcript of a videotape in which the Respondents explicitly detailed the

means of the combination, conspiracy and a large number of projects where anticompetitive contracts were extorted. That transcript was, at a minimum, a direct party admission that the Respondents had engaged in anticompetitive conduct. The two other exhibits were written articles which further identify those projects which the Respondents openly admit that the primary reason they pursued baseless permit objections and sham administrative petitions was to exclude a competitive group of bidders, i.e., nonunion competitors such as the Petitioner. Given the Petitioner's specificity in the complaint, the district court prematurely decided that it was "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 344 U.S. 41, 45-46 (1957); *Radovich v. National Football League*, 357 U.S. 445, 453 (1957).

The Ninth Circuit and the district court in this case lost sight of these straightforward principles in a maze of technical pleading requirements -- requirements which are found nowhere in the Federal Rules of Civil Procedure. Since antitrust claims do not fall under the clear exceptions to standard notice pleading of Federal Rule of Civil Procedure 9, there is simply no legal reason the Petitioner should be held to a heightened standard.

III. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE RULE OF *LOUX V. RHAY* IS INCONSISTENT WITH THE PRINCIPLES OF PLEADING UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND IS IN DIRECT CONFLICT WITH THE RULES OF OTHER CIRCUIT COURTS.

The case of *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967) holds that a party who amends its complaint, whether or not voluntarily, is prohibited from appealing the dismissal of claims raised in the original complaint. The Ninth Circuit Court of Appeals is presently the only federal appellate court which so

holds. Because this rule reflects an archaic notion of notice pleading, it should be reversed.

Loux v. Rhay was an appeal filed in forma pauperis by a state prisoner acting pro se and cites only two appellate cases for the relevant proposition: *Aetna Life Insurance Co. v. Phillips*, 69 F.2d 910 (10th Cir 1934) and *Grubbs v. Smith*, 86 F.2d 275 (6th Cir. 1936), *cert. denied*, 300 U.S. 658 (1937).

Aetna Life has recently been reversed on this very point by the United States Court of Appeals for the Tenth Circuit, acting en banc. *Davis v. TXO Production Corp.*, 929 F.2d 1515 (10th Cir. 1991) (en banc). It is not clear whether *Grubbs* (also involving a pro se plaintiff) stands for this proposition or whether the point is dicta.[8] But, it is clear is that *Grubbs* is obsolete. It was decided before the adoption of the Federal Rules of Civil Procedure in 1938 and reflects a now archaic view of pleading. Thus, for example, the plaintiff's complaint in *Grubbs* was dismissed for misjoinder of legal and equitable causes of action.

The Ninth Circuit now appears to be the only circuit that adheres to the rule that a party waives objections to dismissal by subsequent amendment. Other circuits considering this issue have come to the opposite conclusion.

The Fifth Circuit held in *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978), *vacated on other grounds*, 444 U.S. 959 (1979), that amendment of a dismissed complaint did not bar a plaintiff from appealing the "correctness of the dismissal order." *Id.* at 1238. The court agreed with Wright & Miller that a rule that the plaintiff waives his objections to dismissal by choosing to amend is too mechanical and a "rigid application of the concept that a Rule 15 (a) amendment completely replaces the pleading that it amends." citing 6 Wright & Miller, *Federal Practice and Procedure*, Civil

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[8] It also appears that both *Grubbs* and *Loux v. Rhay* involved plainly frivolous claims. Accordingly, it is possible that this is an example of bad facts making bad law.

Sec. 1476 at 393 (1971)[9] Wright & Miller also point out that if a motion to dismiss is denied, the defendant may still appeal the denial of the dismissal after answering and defending on the merits. *Id.*

The Fifth Circuit also noted that the rule that plaintiff had waived objections to dismissal by subsequent amendment of the complaint would lead to piecemeal appeals. *Wilson, supra.* The Eleventh Circuit adopted the Fifth Circuit approach in *Varner v. Local 91, Glass Bottle Blowers Association*, 674 F.2d 1365 (11th Cir. 1982).

The Seventh Circuit has also held that it is not necessary to re-plead dismissed claims in order to bring them up on appeal because all rulings adverse to the appellant will be brought up when a final decision is appealed. *Bastian v. Petres Resources Corp.*, 892 F.2d 680, 682 (7th Cir. 1990). The court noted "[i]t is not waiver -- it is prudence and economy -- for parties not to re-assert a position that the trial judge has rejected." *Id.* at 682. In this case, Petitioner tried to restate in shorthand form its original complaint in the first amended complaint, and was warned of Rule 11 sanctions if the reference remained in the complaint. Petitioner told the court that it was required to re-plead the RICO claim to preserve it for appeal, and the district court judge rejected the argument as illogical and threatened sanctions. While Petitioner may have agreed with the district court's characterization of the Ninth Circuit rule in *Loux v. Rhay*, the Petitioner's counsel should not have to face sanctions in order to preserve its appeal rights.

The Tenth Circuit has also addressed the question. In *Davis v. TXO Production Corp.*, 929 F.2d 1515 (10th Cir. 1991), the court held that a party who amends a pleading after a claim is dismissed does not waive the right to appeal the dismissal. In making its decision, the court reviewed three earlier 10th Circuit decisions discussing the rule. Two of the decisions, *Leggett v.*

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[9] Wright & Miller have not changed their position in later editions of this treatise. *See* Sec. 1476, p. 560-61 (1990).

Montgomery Ward & Co., 178 F.2d 436 (10th Cir. 1949) and *Aetna Life Insurance Co. V. Phillips*, 69 F.2d 901 (10th Cir. 1934) are consistent with *Loux v. Rhay*. The court found the rule "formalistic" and overruled *Leggett* and *Aetna*. *Davis*, 929 F.2d at 1517-18.

The Ninth Circuit's rule, as expressed in *Loux v. Rhay* and its progeny, waiving objection to a dismissed complaint if the party chooses to amend and not re-allege the dismissed claims should be overturned. Both scholars and other circuits agree that it is mechanically formalistic, and a trap for the unwary. At a time when judicial economy is highly valued the rule promotes form over substance and invites piecemeal appeals.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should issue to resolve these issues and conflict of federal law.

Respectfully submitted,

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December, 1993

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APPENDIX A

[Filed Sep 24 1993]

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-15511

D.C. No. CV-90-03628-EFL

PETROCHEM INSULATION, INC.,

Plaintiff-Appellant,

v.

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE UNITED STATES & CANADA, LOCAL UNION NO. 38, AFL-CIO; THOMAS R. ADAMS; ADAMS & BROADWELL; THOMAS J. HUNTER; NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, District Council 51, et al; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 437, 444, 447, 460, 471, 483, 492, 503 AND 662,

Defendants-Appellees.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 302, amicus,

Amicus.

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Argued and Submitted August 12, 1993
San Francisco, California

Before: KOZINSKI, THOMPSON, and T.G. NELSON, Circuit Judges.

A. Antitrust Section 1 Claim

We have held that failure to allege injury to competition is a proper ground for dismissing a §1 claim. *Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 858 F.2d 567, 570 (9th Cir. 1988). "Indispensable to any section 1 claim is an allegation that *competition* has been injured rather than merely competitors." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987) (emphasis in original); *see also Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 507-08 (9th Cir. 1989) (affirming 12(b)(6) dismissal for failure to state a §1 antitrust claim because plaintiff failed to allege an unreasonable restraint of or injury to competition).

Petrochem has failed to allege injury to *competition*. Rather, it merely alleges injury to its own business, either because it was denied the opportunity to bid on certain projects, or because it was not awarded certain contracts. An allegation of injury to its own business interests alone

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 3-63.

is not enough to establish injury to the market as a whole. *See Les Shockley,* 884 F.2d at 508.

Petrochem marshals three arguments in response. First, it asserts that if four open shop contractors are eliminated, there is a substantial numerical reduction in competition. We rejected a similar argument in *Les Shockley,* reasoning that although removal of one or more competitors from a market necessarily has an effect on competitive conditions within that market, it is only when such an agreement or other arrangement "becomes unreasonably disruptive of market functions such as price setting, resource allocation, market entry, or output designation" that there may be a potential Sherman Act violation. 884 F.2d at 508. Petrochem does not allege detrimental competitive effects. Mere injury to its own position as a competitor is insufficient to state an antitrust claim. *See id.; see also Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.,* 710 F.2d 1366, 1373 (9th Cir. 1983) ("it is injury to the market, not to individual firms, that is significant") (internal quotations omitted).

Second, Petrochem asserts that this deficiency is overcome because the complaint sufficiently alleges anticompetitive intent. Although intent to harm competition in the relevant market may state a claim for relief under certain circumstances, conclusory allegations are insufficient in the absence of anticompetitive conduct from which such specific intent may be inferred. *Rutman Wine Co.,* 829 F.2d at 735. Petrochem points to the allegations of sham petitioning contained in the complaint and Exhibit 1 as proof of anticompetitive intent. However, the *Noerr-Pennington* doctrine shields legitimate efforts to use the adjudicative (or the legislative) process to achieve certain goals from antitrust liability

regardless of anticompetitive intent or purpose. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S.Ct. 1920, 1927 (1993). Moreover, Petrochem's sham petitioning claim alleges only unilateral action, and therefore cannot form the basis of its §1 antitrust claim. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 634 (9th Cir. 1987) ("Independent action does not fall within the ambit of §1 of the Sherman Act."). Section 2 of the Sherman Act encompasses unilateral action. *Id.*

Third, despite the pleading deficiencies noted above, Petrochem contends that the district court erred in requiring "an impossible burden of factual specificity" and that it should be allowed to obtain such facts through discovery. Petrochem is mistaken. We have previously stated that a pleader may not evade the §1 antitrust elements "by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust." *Rutman Wine Co.*, 829 F.2d at 736 (internal quotations omitted) (affirming 12(b)(6) dismissal because complaint failed to allege injury to competition); *see also Les Shockley*, 884 F.2d at 507-08 (same).

Petrochem cites *Beltz Travel Serv., Inc. v. International Air Transp. Ass'n*, 620 F.2d 1360, 1366 (9th Cir. 1980), to support its proposition that discovery may be the only method by which the facts underlying an alleged agreement would be revealed. *Beltz* does not relieve Petrochem of its burden to present factual allegations. In *Beltz*, the complaint alleged numerous acts of the defendants which were in furtherance of the conspiracy and it established the three §1 prerequisites necessary to state a §1 claim. *Id.* at 1365. The complaint and affidavit in

Beltz also set forth all the facts regarding the objectives and accomplishments of the conspiracy. *Id.* at 1365-66.

Petrochem also complains that it should not be "punished" because it was unable to obtain written agreements as to each and every conspiracy and that without such agreements it could not outline the specific details of those agreements. It is true that the district court's order granting leave to amend stated that Petrochem was to identify the agreements, parties, and terms *to the extent possible* as well as attach the agreements, *if they were in Petrochem's possession.* The complaint was not dismissed *because* the agreements were not attached. Rather, it was dismissed because there was insufficient factual support to indicate that such agreements did in fact exist.

B. Antitrust Section 2 Claim

Petrochem's complaint failed to allege that the defendants possess monopoly power in the relevant market, one of three prerequisites for establishing a monopolization claim under §2. *See Rutman Wine Co.*, 829 F.2d at 736. Petrochem defined the relevant market as a pipe and insulation subcontracting market located in Northern and Central California. Petrochem has failed to allege that the defendants possess monopoly power in that market. The defendants' alleged activities under Petrochem's §2 claim are *unilateral.* Because the defendants do not possess a share of the relevant market, their actions alone cannot achieve monopoly power.

Similarly, Petrochem has failed to allege the requisite elements of an attempted monopolization claim. *See id.*

C. Alleged RICO Violation.[1]

Because Petrochem has failed to establish a violation of the LMRA, §186, there is no predicate act upon which to base a RICO claim. Section 186 prohibits an employer from paying money to a union. *See* 29 U.S.C. §186; *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund for Northern Ca. (ABC)*, 700 F.2d 1269, 1274 (9th Cir.), *cert. denied*, 464 U.S. 825 (1983). A violation of §186 serves as a predicate act under the RICO statute, 18 U.S.C. §1961(1)(C). However, the LMRA provides an exception to §186 which "permits an employer to transfer money to a union if: (1) the money is in payment of membership dues; (2) the employer has received a valid written authorization from the employee; *and* (3) the money is deducted from wages." *ABC*, 700 F.2d at 1274 (emphasis in original).

Petrochem's complaint alleges facts which establish the first and third elements of the exception, i.e., that BIDS is funded with money in payment of membership dues and that the money is deducted from wages:

> BIDS . . . is *funded by money taken out of membership dues and transmitted to Defendants by employers pursuant to a dues check-off procedure* . . . . [BIDS is] a sales program, funded by dues, funneled through District Council 51, and *paid to the Council by union contractors payroll deductions.*

Further, Petrochem does not allege that the employers did not receive valid written authorizations from employ-

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[1] In an order filed August 6, 1993, we dismissed Petrochem's RICO extortion claim because Petrochem waived the issue when it failed to include that claim in its amended complaint. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

ees. Petrochem has failed to allege a predicate act upon which to base its RICO claim.

Petrochem contends that the funds transferred to the union for the BIDS program are not "membership dues" because the union does not use those dues for permissible purposes, such as organizing activities, contract bargaining or working condition and wage issues. Petrochem asserts that BIDS has two improper uses: (1) collection of project data in order to track projects in the permit stage; and (2) circulation to union contractors information as to those construction projects.

We rejected a similar argument in *ABC*. In that case, ABC argued that the union used part of the revenue from "supplemental dues" for impermissible political purposes, i.e., to hire organizers to combat the open shop movement in the construction industry and to discourage employers from going non-union. *ABC*, 700 F.2d at 1275. ABC contended that because membership dues were used for improper political purposes, they were "not in payment of membership dues," and thus there was a LMRA violation. *Id.* We disagreed, holding that the First and Fourteenth Amendments do not proscribe a union's expenditure of dues revenue for political purposes *unless* the employees who pay those dues affirmatively object to that union's use of their dues. *Id.* ("Money spent on organizing to eliminate competition from non-union employers is germane to collective bargaining and therefore is not a 'political' expenditure for purposes of first amendment analysis.").

Similarly, the dues in this case are used for organizing to eliminate competition from non-union employers. The two uses Petrochem challenges, collecting and circulating project data, help the union shops organize and

compete for those projects. Hence, the district court properly dismissed Petrochem's RICO claim because absent the LMRA violation, there is no predicate act upon which to base this claim.

AFFIRMED.

APPENDIX B

PETROCHEM INSULATION, INC.,

Plaintiff,

v.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, District Counsel 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; Local Unions 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662; Thomas R. Adams; Thomas R. Adams, P.C.; Adams & Broadwell, P.C.; and Thomas J. Hunter,

Defendants.

No. C-90-3628 EFL

United States District Court, N.D. California

March 19, 1992

Mark Thierman, Thierman, Cook, et al., San Francisco, Cal., for plaintiff.

Jerome Falk, Howard, Rice, et al., San Francisco, Cal., for defendants.

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

LYNCH, District Judge.

*1 The above-captioned matter came before this Court pursuant to defendants' motion to dismiss plaintiff's second amended complaint. In that complaint, plaintiff has attempted to assert five claims for relief. Plaintiff's first claim for relief alleges an antitrust violation regarding "hot cargo agreements." Plaintiff's second claim alleges that defendants monopolized the insulation subcontracting market through "sham petitioning" of certain governmental proceedings. Plaintiff's third, fourth and fifth claims allege RICO violations relating to certain union "dues checkoff" procedures. Plaintiff and defendants vigorously dispute whether or not this action may be characterized as a "SLAPP" suit, or a "Strategic Lawsuit Against Public Participation." In other words, plaintiff contends that the defendants have abused certain administrative permit granting processes by making baseless environmental objections in an effort to force project owners to boycott non-union contractors. Defendants, on the other hand, contend that plaintiff's suit infringes on their first amendment right to participate in public hearings and administrative proceedings. Accordingly, this case implicates important issues of public policy.

BACKGROUND

Plaintiff's second amended complaint represents plaintiff's third effort to state a cognizable complaint attacking defendants' participation in public govern-

mental permit proceedings. Plaintiff's initial complaint asserted that a RICO conspiracy existed between nineteen local unions, a district council, the council's business manager, its attorney, and his law firms. In essence, the original complaint alleged that the conspiractors participated in the permit process to extort union-only project agreements from construction developers, resulting in a violation of Section 8(e) of the National Labor Relations Act ("NLRA"). The Court granted defendants' motion to dismiss that complaint without leave to amend, finding that plaintiff's RICO claims were preempted by the NLRA.[1] At that time, plaintiff requested leave to file an amended complaint alleging antitrust violations based on union-only project agreements. The Court allowed plaintiff to file a motion for leave to file such an amended complaint, which plaintiff attempted, adding a new theory of RICO violation as well, based on certain employers' transmittal of union dues in violation of 29 U.S.C. s 186.[2]

The Court found the first amended complaint facially inadequate, and denied leave to file it. The Court did allow plaintiff 45 days to file a second amended com-

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[1] See Order Dismissing Complaint Without Prejudice, entered April 30, 1991 ("April 30 Order"). The Court held that plaintiff's RICO claims were preempted by the NLRA because the predicate act alleged, criminal extortion, was founded upon a violation of the NLRA which confers jurisdiction on the National Labor Relations Board.

[2] At the time it moved for leave to amend, plaintiff also moved for reconsideration of the Court's initial dismissal of the RICO extortion claims; for amendment of its original complaint nunc pro tunc to add antitrust claims; and for certification of the ruling on the RICO extortion claims as a partial final judgment under Rule 54(b). The Court denied each of these motions. See July 30 Order at 2.

plaint, but specifically cautioned plaintiff that any RICO claims would have to conform to the Court's Standing Order regarding RICO claims, and that any antitrust claims would have to be pled with specificity. Plaintiff filed a second amended complaint, and the defendants have brought the instant motion to dismiss. The Court will consider the plaintiff's RICO claims first, and then turn to the plaintiff's antitrust claims.

RICO CLAIMS

1. Plaintiff's Predicate Act Is Legal.

*2 Plaintiff's allegations of RICO violations stem from a program known as "BIDS" ("Bidder Information and Directory Service"), a program through which unions collect information about new or proposed construction projects. Plaintiff alleges that the unions supply such information to union personnel for assistance in organizing, and to union contractors to facilitate bidding for projects that will then employ union labor. Plaintiff does not contend that it has ever lost a project as a result of BIDS, nor that any acts undertaken by BIDS are illegal, but rather that the way BIDS is funded violates labor laws. Specifically, plaintiff asserts that BIDS is funded by money taken from membership dues and transmitted to defendants via a checkoff procedure in violation of 29 U.S.C. s 186. That violation, in turn, serves as the predicate act for plaintiff's RICO claims.

Section 186 generally prohibits payments by employers to labor organizations or their representatives, with nine enumberated exceptions. One of those exceptions states that "[t]he provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues

in a labor organization . . . ." 29 U.S.C. s186(c)(4) ("union dues exception"). This exception recognizes that dues, while often transmitted for convenience by employers directly to a union pursuant to a checkoff procedure, are actually payments to the union from employees, and not employers.[3]

Nonetheless, plaintiff alleges that the union dues exception does not apply because of the uses to which the dues are put. Those alleged uses are: (1) the collection of project data and its distribution to union organizers and contractors; (2) the organizing of employees of non-union contractors; and (3) combatting the open shop movement. Thus, according to the plaintiff's theory, these payments are not union dues with the meaning of s 186 because the funds are not spent on negotiation, collective bargaining, or union organizing of employees of non-signatory companies. Under the Ninth Circuit's precedent in Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund, 700 F.2d 1269 (9th Cir.), cert. denied, 464 U.S. 825, (1983) [hereinafter "ABC" plaintiff's argument is misguided: [plaintiff] argues first that the monies transferred to the Union as 'supplemental dues' are not in payment of 'membership dues' because the Union uses part of the revenues from such supplemental dues for 'political' purposes, that is, to hire

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[3] Plaintiff's allegations make clear that the subject funds are within the union dues exception:

> "[T]he BIDS program . . . is funded by money taken out of membership dues and transmitted to Defendants by employers pursuant to a dues check-off procedure . . . . [the BIDS program is] funded by dues, funnelled through District Council 51, and paid to the Council by union contractor's payroll deductions." Complaint at para. 95, emphasis added.

organizers to combat the 'open shop' movement in the California construction industry and to discourage employers from going non-union. [Plaintiff] contends that since 'membership dues' cannot be expended for political purposes, the money deducted here is not 'in payment of membership dues' and thus Lloyds is prohibited by [s 186] from transferring such monies to the union. We disagree. Id. at 1275.

*3 Accordingly, the Ninth Circuit held that dues checkoff funds used for organizing non-union labor and promoting union labor were within the union dues exception and in no way prohibited by s 186. Id. at 1274-75.[4] The Court finds this precedent squarely controlling, and in light of the ABC case, plaintiff's RICO claims must be DISMISSED. As the court in ABC noted, "[m]oney spent on organizing to eliminate competition from non-union employers is germane to collective bargaining . . . " Id. at 1275. Additionally, plaintiff's theory finds no support in the text of the labor statute plaintiff attempts to rely upon. Section 186 in no way limits how such dues may be spent. Moreover, in Communications Workers of America v. Beck, 487 U.S. 735 (1988), the Supreme Court considered the ramifications of restrictions on the use of union dues. With respect to dues collected from union members, Beck confirmed that congress viewed as permissible the full use of union dues, including allocation to activites other than collective bargaining. Id. at 756.

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[4]The Court stated that: "An expenditure is considered 'political' for purposes of first amendment analysis only if it is not germane to the union's work in the realm of collective bargaining. Ellis, 685 F.2d at 1072-73. Money spent on organizing to eliminate competition from non-union employers is germane to collective bargaining and therefore is not a 'political' expenditure for purposes of first amendment analysis." ABC, 700 F.2d at 1275.

Plaintiff argues, however, that Beck and two other recent cases, Lehnert v. Ferris Faculty Association, ---- U.S. ----, 111 S.Ct. 1950 (1991) and Lucid v. City and County of San Francisco, 774 F.Supp. 1234 (N.D.Cal. Oct. 28, 1991) support plaintiff's argument that the misallocation of money collected as dues but not used for collective bargaining within the bargaining unit violates the law. Those cases, however, are inapplicable. Each of those cases involved state statutes that compelled employees in a union shop who did not wish to join the union to nonetheless pay a "service" or "agency" fee. The theory behind such statutes is that each employee enjoys the workplace benefits secured by virtue of the union's collective bargaining efforts. In such situations, a balance must necessarily be achieved between that legitimate goal and the first amendment rights of employees to be free from compelled support of the union. As a result, service fees may be collected and disbursed only in connection with collective bargaining activities. In the present case, however, only dues from union members are involved, and case law regarding the legitimate uses to which the service fees of non-members may be put are inapplicable.[5]

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[5] Also, plaintiff cites a case by the Wage Appeals Board of the U.S. Department of Labor as support for the proposition that monies spent targeting jobs cannot be considered dues. Building and Construction Unions Job Targeting Programs, 37 Constr. Labor Rpt. (BNA) 908 (1991). That case, however, merely concerns the legality of certain deductions because they resulted in employees' wages going below levels mandated by state law. Thus, plaintiff garners no real support from that case. In that case, because an individual employee sees no actual benefit from funds directed to the job targeting program, the money withheld must be considered a deduction and not a fringe benefit, triggering scrutiny of whether the resulting wage falls below mandated levels.

In sum, then, the practices alleged by plaintiff in this case are lawful under s 186. Since plaintiff's RICO claims are premises solely upon alleged violations of s 186, plaintiff's RICO claims must be DISMISSED.

2. Plaintiff Lacks Standing.

In addition, the Court has determined that there are two other premises upon which the Court could base the dismissal of plaintiff's RICO claims. First, even assuming a violation of s 186 were properly alleged, plaintiff would nonetheless suffer from a lack of standing to make such an assertion. Section 186 prohibits payments by employers to labor organizations to inhibit corrupt practices through which labor representatives might be induced to betray their trust to their constituents. See, e.g., Maxwell v. Lucky Constr. Co., 710 F.2d 1395, 1398 (9th Cir. 1983). As a result, the only parties with a judicially cognizable interest in the enforcement of s 186 are the paying employers, the unions, their representatives or trustees, and their constituent employees. Plaintiff, who is none of these, has no standing to challenge an alleged violation.

*4 A case that has directly addressed this issue is Hibernia Bank v. International Brotherhood of Teamsters, etc., 411 F.Supp. 478 (N.D.Cal. 1976). In that case, this Court quoted from Employing Plasterers' Ass'n v. Journeymen, Plasterers' Protective & Benevolent Soc., 279 F.2d 92, 99 (7th Cir. 1960):

> "The right to test the legality of employer contributions . . . is available to employees and employers as well as to such other parties as may be directly concerned with the payment, acceptance, and administration of the [funds at issue]." Hibernia Bank, 411 F.Supp. at 484.

The Court found the following to be an "apparently exhaustive enumeration of the basic categories of potential plaintiffs who have standing to sue under" s 186: (1) employers who make the payments; (2) unions whose representatives receive the payments; (3) the employees represented by such unions; and (4) the trustees of such unions. Id. at 485. This Court today affirms this approach, and holds that plaintiff lacks standing. If anything, it is the activities of the BIDS program, and not its manner of funding that has had any potential affect on plaintiff. Plaintiff has not provided this Court with any explanation of how any alleged violation of s 186 has resulted in a loss to plaintiff.[6] As mentioned earlier, plaintiff has not alleged that it has ever submitted a low bid that was not accepted nor alleged any other damage linked to any purported violation of s 186.

Plaintiff argues, however, that standing in RICO cases must be broadly construed. However, Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495 (1985) reiterates that the compensable injury is the harm caused by the predicate act. Without a predicate act and harm that has been proximately and legally caused by that act, a RICO claim cannot proceed. Securities Investor Protection Corp. v. Vigman, 908 F.2d 1461, 1467-68 (9th Cir. 1990). See also National Enterprises, Inc. v. Mellon Financial Services Corp. Number 7, 847 F.2d 251, 254 (5th Cir. 1988) (because plaintiff lacks a cognizable injury resulting from the RICO conduct, plaintiff lacks standing to bring suit). Thus, in the final analysis, plaintiff's RICO claim is that BIDS is funded from the wrong source in

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[6] Thus, it would appear that plaintiffs in the instant case are even further removed from standing than the bank that sought, and was denied, standing in Hibernia. In that case, the bank had handled the deducted funds and suffered a loss due to an overdraft.

violation of s 186. Any injury, however, does not result from the source of the funds, but rather results ostensibly from the presence of the program itself. Plaintiff is neither the source of nor recipient of any such funds, and without such causation, plaintiff lacks standing, providing the Court with an additional basis upon which dismissal could be premised.

3. Failure to Comply With Court Orders.

Finally, this Court finds that there is a third basis upon which this Court may dismiss plaintiff's RICO claims: failure to comply with this Court's previous, specific orders. In its Order of July 30, 1991, this Court cautioned plaintiff that any RICO claims would have to conform with this Court's Standing Order regarding RICO cases. That Standing Order directs a RICO plaintiff to, inter alia:

> *5 15. Describe the alleged injury to business or property.
>
> 16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.
>
> 17. List the damages sustained by reason of the violation of s 1962, indicating the amount for which each defendant is allegedly liable. Standing Order at 5.

Plaintiff's second amended complaint contains no description whatsoever of what injury plaintiff has suffered in its business or property; no description of damages; and no description of the direct causal relationship to the commission of any predicate act. The Court has been enormously patient with the plaintiff, not only entertaining three attempts to make out a RICO claim, but providing guidance to plaintiff in that endeavor.

Plaintiff has nonetheless failed to comply with this Court's orders, creating a third basis upon which this Court may dismiss their RICO claims. In sum, then, plaintiff's RICO claims are HEREBY DISMISSED because the predicate acts complained of are legal; the plaintiff lacks standing; and because plaintiff has failed to comply with this Court's orders.

SHERMAN ACT sec. 1 CLAIM

Plaintiff's first cause of action is for a violation of s 1 of the Sherman Act arising from defendants' alleged conspiracy and combination with construction project owners to enter into unlawful "hot cargo" agreements. Again, this claim is predicated on the contention that defendants have entered into union-only project agreements violating s 8(e) of the NLRA, 29 U.S.C. s 158(e). As explained below, plaintiff still fails to state a cognizable claim for two independent reasons, each of which has previously been explained to plaintiff, and each of which plaintiff has failed to cure.

1. Plaintiff Has Not Identified The Parties To And Contents Of Any Contract, Combination Or Conspiracy.

Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies in restraint of trade. 15 U.S.C. s 1. Accordingly, the first step in a s 1 analysis is to determine the identity of the alleged conspirators and the content of the alleged conspiracy. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 633 (9th Cir. 1987). The identities of the contracting parties and the contents of such agreements determine their legality under a number of well-established precepts. First, under the "statutory exemption," unions are

exempt from the antitrust laws unless they combine with non-labor entities. United States v. Hutcheson, 312 U.S. 219, 232 (1941). Second, while union-only agreements are generally proscribed by s 8(e), such agreements are explicitly authorized for the instant industry by the "construction industry proviso" to s 8(e) when the agreements arise in relation to collective bargaining. 29 U.S.C. s 158(e); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 648 (1982). Such collective bargaining relationships can be established by a "pre-hire" agreement to use union-only labor, as authorized by s 8(f) of the NLRA. 29 U.S.C. s 158(f).[7] Thus, by complying with these doctrines, unions who desire project agreements can ensure their legality through the terms of the agreements and the identities of the parties to them.

*6 In this action, after rejecting the inadequate allegations of a contract, combination or conspiracy in the first amended complaint, this Court specifically instructed plaintiff on how plaintiff must allege an antitrust claim:

> (a) The specific identity of, and each party to, each contract, combination, or conspiracy in restraint of trade to which a non-labor group was allegedly a member, and in additional shall conform to the following:
>
> (1) In the event that plaintiff contends any union-only project agreement or other contract

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[7] Also, an employer who is largely involved in non-construction industries may take advantage of s 8(f) [and enter a pre-hire agreement] if it is sufficiently engaged in construction work at one site. A.L. Adams Constr. Co. v. Georgia Power Co., 733 F.2d 853, 856-57 (11th Cir. 1984), cert. denied, 471 U.S. 1075 (1985). Additionally, if a developer acts as its own general contractor, or has subsidiaries or related entities which employ labor in the construction industry, then union-only project agreements are allowed. Id. at 857-58.

is an illegal restraint of trade or part thereof, for each such agreement it shall identify to the extent possible the agreement, each of the parties to it, its terms, and shall attach the agreement, if it is in plaintiff's possession.

(2) In the event that plaintiff contends that any combination or conspiracy to restrain trade exists apart from any contract, plaintiff shall identify each combination and conspiracy, shall identify the parties to it by name, shall describe its common scheme, and shall describe the unlawful objective.

(b) The acts each defendant performed or undertook in furtherance of each contract, combination or conspiracy.

(c) The injury to competition that resulted from each alleged contract.

(d) The geographic and product market allegedly monopolized by any defendant, and the acts each named defendant undertook to pursue monopolization of that market. July 30 Order at 2-3.

Clearly, plaintiff has not compled with this Court's instructions for pleading a contract in restraint of trade. Plaintiff refers to four projects for which it was unable to bid, but in none of these cases does plaintiff's allegations suffice to form a cognizable complaint.

First, plaintiff complains that it was unable to bid for one project because "General Electric agreed with Defendants to boycott open-shop contractors." Second amended complaint at paragraph 55. However, plaintiff does not identify a single defendant who so agreed; does not plead the agreement's terms, nor attach a copy of it; nor does plaintiff plead what acts any defendant undertook in furtherance of such an agreement.

Second, plaintiff alleges that it lost an opportunity to bid when a prime contractor known as Gotaverken "signed an agreement prohibiting Gotaverken from using or retaining open-shop contractors." Second amended complaint at paragraph 60. This assertion, brought verbatim from the first amended complaint, still fails to state with whom the supposed agreement was made; what its terms were; why no copy of this signed document is attached or available or unavailable; or state what acts any defendant undertook in furtherance of it.

Third, plaintiff alleges that "Local 549 . . . coerced GWF into signing a union-only agreement." Second amended complaint at paragraph 65. Local 549, however, is not one of the numerous defendants plaintiff has named. Additionally, plaintiff fails to state whom this alleged project agreement was with; what its terms were; and the roles of defendants.

*7 Finally, plaintiff has contended that it could not bid after Chevron "either signed or agreed to sign a mandatory union-only contract . . . or agreed to retain a general contractor who would be required to sign such an agreement." Second amended complaint at paragraph 73. Again, the parties to the agreement are not identified; its terms are not plead; no copy is attached; and there are no allegations of what acts any defendant undertook in furtherance of the alleged agreement.

Plaintiff is incorrect in characterizing these fundamentals as "evidentiary details" that may be supplied later through discovery. Without such facts as the identities of the parties to the alleged agreement, plaintiff has not adequately plead a violation of the antitrust laws, since union-only agreements are not intrinsically improper. Accordingly, plaintiff, on its third attempt, has failed to

set forth necessary elements of a s 1 antitrust cause of action, and plaintiff's s 1 claim must therefore be DISMISSED.

2. Plaintiff Has Not Pleaded Injury to Competition.

The Court notes that there is a second, independent reason that warrants the dismissal of plaintiff's s 1 claim: plaintiff's failure to plead the injury to competition that resulted from each alleged contract in restraint of trade. See July 30 Order at 3. That Order reflects two basis antitrust precepts: (1) where, as here, the rule of reason analysis applies, plaintiff must plead injury to competition; and (2) where, as here, an antitrust claim is alleged against labor entities, labor's "non-statutory exemption" requires heightened pleading of injury to competition.

Under Ackerman-Chillingworth, Division of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n, 405 F.Supp. 99, 114-18 (D. Haw. 1975), aff'd 579 F.2d 484, 490 n.7 (9th Cir. 1978), cert. denied, 439 U.S. 1089 (1979), a s 8(e) violation is not per se an illegal boycott. Accordingly, the rule of reason applies, and a claim must allege that competition has been injured, rather than injury to competitors. Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734 (9th Cir. 1987). Likewise, in Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989), the Ninth Circuit stated that: "This limitation on the reach of the Sherman Act is reflected in our repeated injunctions that section one claimants must plead and prove a reduction of competition in the market in general and nor mere injury to their own positions as competitors in the market." That court also noted that "removal of one or a few competitors need not equate with injury to competition." Id.

Plaintiff's second amended complaint, however, alleges injury only to plaintiff. At most, it alleges that plaintiff could not submit bids to four projects out of the approximately 93 projects identified in the complaint. It does not allege that plaintiff actually submitted a low bid, nor that any project awarded plaintiff was withdrawn. But even assuming that plaintiff adequately alleged "injury to itself, its conclusion that competition has been harmed thereby does not follow." Rutman Wine, 829 F.2d at 734.

*8 In Les Shockley, for example, the plaintiffs alleged that they had been excluded from a particular market. Affirming the district court's dismissal of that amended complaint, the Ninth Circuit held that:

> Ordinarily, the factual support needed to show injury to competition must include proof of the relevant geographic and product markets and demonstration of the restraint's anticompetitive effects within those markets. Avoiding such market analysis requires proof of actual detrimental competitive effects such as output decreases or price increases. Les Shockley, 884 F.2d at 508 (citations omitted).

In much the same manner, the plaintiff in the instant case has failed, in three opportunities, to include factual allegations suggesting that the market for insulation subcontracting has been harmed by the defendants. There are no allegations of output decreases or price increases in the market, nor is there any allegation of any other effect on the "characteristic or function of a competitive market." Id. at 509.[8]

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[8] Plaintiff's claim that the "vast majority" of industrial piping and insulation projects have been performed by subcontractors

[footnote continued]

Finally, because plaintiff's antitrust allegations are brought against a labor organization, plaintiff must plead significant injury to competition to avoid the unions' "non-statutory exemption." This judicially fashioned exemption "prevents the antitrust laws from being used to frustrate the primary and legitimate goal of the federal labor law, which is to permit employees to organize and act to improve wages and working conditions." Richards v. Neilsen Freight Lines, 810 F.2d 898, 905 (9th Cir. 1987) (citing Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975)). According to Richards, union-imposed restraints that are designed to improve wages and working conditions are generally shielded by this exemption "unless they produce significant anti-competitive effects apart from those that normally result from elimination of competiton over wages and working conditions." Id. Plaintiff has failed to allege such significant anticompetitive effects – nothing in the second amended complaint suggests that the exclusion of plaintiff would eliminate any competition beyond whatever advantage plaintiff might derive from not paying union scale wages.

Accordingly, because plaintiff has failed to identify the parties to and contends of any alleged combination and because plaintiff has not sufficiently pleaded injury to competition, plaintiff's s 1 antitrust claim must be DISMISSED for failure to state a claim.

Plaintiff, however, argues that in the instant case, the rule of reason does not apply, and that any violation of

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using union labor is completely insufficient as a market analysis. Such a statement does not equate with the conclusion that the subcontracting market is any less competitive. In fact, the plaintiff's allegations make clear that at least five different union contractors compete in this market.

s 8(e) constitutes a per se antitrust violation, for which injury to competition may be presumed. The Court disagrees.

Per se antitrust violations have been found in only exceptional circumstances, and are limited to those agreements or practices whose pernicious effects are so manifest and whose lack of redeeming features so obvious that they may be presumed unreasonable. Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1445 (9th Cir. 1988).[9]

*9 Plaintiff maintains that the rule of reason is inapplicable, because defendants' conduct amounts to a "group boycott." Use of that term, though, is not enough.[10] Boycotts can take a variety of forms and courts will not necessarily apply the per se rule, especially where the impact of the arrangement is not obvious. Oltz, 861 F.2d at 1445 n.1. Next, the cases plaintiff cites to demonstrate application of the per se rule to group boycotts all involve "horizontal boycotts," situations where one competitor attempts to exclude others on the same level.[11] However, the instant case involves a vertical

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[9] Thus, a certain practice can be said to constitute a per se violation only after extensive judicial experience has established that anticompetitive consequences regularly flow from that practice.

[10] The Supreme Court has stated that " '[g]roup boycotts' are often listed among the classes of economic activity that merit per se invalidation under s 1. Exactly what types of activity fall within the forbidden category is, however, far from certain." Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293-94 (1985) (citations omitted).

[11] Plaintiff cites: United States v. General Motors Corp., 384 U.S. 127 (1966) (retailers induced manufacturer not to sell to competing retailers); Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941) (certain manufacturers attempted to induce retailers to boycott competing manufacturers); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (one retailer sought to eliminate another retailer from a particular market).

agreement between a union and a developer who stands at least two levels higher in the production system. In other words, the contracts alleged are not directed at excluding competitors at the level of either the unions or developers. In fact, where courts have considered vertical agreements, per se treatment has regularly been denied. Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734-35 (9th Cir. 1987); Gough v. Rossmoor Corp., 585 F.2d 381, 387 (9th Cir. 1978); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 619 F.Supp. 441, 449 (N.D.Cal. 1985) ("an alleged boycott between vertically related defendants is not per se unlawful"). See also Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n, 405 F.Supp. 99, 114-18 (D. Hawaii 1975) aff'd 579 F.2d 484, 490 n.7 (9th Cir. 1978), cert. denied, 439 U.S. 1089 (1979) (section 8(e) violation is not per se illegal boycott).

Plaintiff also asserts that Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) requires application of the per se rule.[12] While that case may be distinguished on its facts, the

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[12] In Connell, the Court held that the antitrust laws are applicable, though not necessarily violated by, a general contractor's agreement with a union to exclude any subcontractor who was not a signatory to a standardized multiemployer agreement with the union. In that case, the agreement specifically disclaimed any intent on behalf of the union to organize or represent the contractor's employees in collective bargaining. Additionally, the Connell agreement was not limited to one construction site, but applied to all projects the contractor pursued. Finally, that agreement contained a "most favored nation" clause that guaranteed that each subcontractor would receive the same terms from the union. These factors, not present in the instant case, had the effect of eliminating competition.

more fundamental flaw with plaintiff's argument is that Connell simply did not speak to the issue of whether or not the rule of reason or the per se doctrine applies in such a case. Rather, the Connell court remanded the action for a determination of whether or not antitrust liability existed, rather than finding the conduct to be a per se violation.[13] Accordingly, as plaintiff has failed to allege any activity that falls within those scenarios justifying per se treatment, the rule of reason applies,[14] and as discussed, plaintiff's s 1 claims must be DISMISSED.

SHERMAN ACT s 2 CLAIMS

Plaintiff has also attempted to plead a violation of s 2 of the Sherman Act, alleging that the defendants used sham petitions and meritless environmental objections to monopolize their market and restrain trade. For three independent reasons, this claim must also be DISMISSED.

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[13] Applying this, the Court in Larry v. Muko, Inc. v. Southwestern Pennsylvania Bldg. and Constr. Trades Council, 670 F.2d 421 (3d Cir. 1982) held that "an agreement which under Connell is found unprotected by the labor exemption must still be examined under traditional antitrust analysis to determine if it has a sufficient anticompetitive effect to constitute an antitrust infraction. Id. at 427. See also Richards v. Neilsen Freight Lines, 810 F.2d 898, 906 (9th Cir. 1987) ("Connell does not suggest that every violation of Section [8(e)] gives rise to an antitrust suit.").

[14] As a practical matter, the Court notes that were plaintiff's activities so clearly an antitrust violation that per se liability could be invoked, plaintiff's initial attempts to fashion a RICO case from those same activities would be largely inexplicable.

1. It Is Legally Impossible For Labor Unions To Monopolize The Pipe And Insulation Subcontract Market.

First, the relevant markets in question, as noted by the plaintiff, are the "construction sub-contract [markets] for the installation of piping and insulation." Defendants, however, are clearly not in the pipe and insulation subcontracting market. Defendants are labor unions that provide workers to contractors and sub-contractors with whom they have collective bargaining agreements. See Genser v. Int'l Brotherhood of Electrical Workers, 522 F.Supp. 1153, 1155 (N.D.Ill. 1981) ("[t]he Union's relevant market is labor, not the electrical contracting business; thus the Union could not unilaterally monopolize or attempt to monopolize the electrical contracting market").

*10 Plaintiff's claim could potentially be salvaged were plaintiff able to allege that defendants had conspired to monopolize another market with a participant within that market. See Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 547 F.Supp. 893, 899 (S.D. Ohio 1981), aff'd, 691 F.2d 818 (6th Cir. 1982) ("the fact that [defendant] was not itself engaged in [that business] does not perforce exclude any claim that it conspired with another company that was so engaged . . ."). However, such a claim requires that the unions have conspired with a union contractor or any other participant in the relevant market. The Second amended complaint, though, does not mention any participation by or conspiracy with union contractors or subcontractors in the sham petitioning activity. Without such allegations, the claim for conspiracy to monopolize defendants' market must fail. Vague and conclusory references to unnamed conspiractors will not suffice. Plaintiff was made aware

of this requirements in this Court's Order of July 30 in which plaintiff was instructed that "plaintiff shall identify each combination or conspiracy, shall identify the parties to it by name, shall describe its common scheme, and shall describe its unlawful objective." Clearly, plaintiff has failed to comply with that Order.

2. Plaintiff Has Failed To Plead The Requisite Involvement Of Non-Labor Groups Necessary To Defeat The Statutory Exemption.

Labor benefits from a "statutory exemption," distinct from the non-statutory exemption discussed earlier, that immunizes union contract from antitrust laws as "long as a union acts in its self-interest and does not combine with non-labor groups." United States v. Hutcheson, 312 U.S. 219, 232 (1941). If a union aids or abets non-labor groups creating business monopolies or in controlling markets, the exemption is lost; but unions acting alone are beyond the reach of the antitrust laws. Allen Bradley Co. v. Int'l Brotherhood of Electrical Workers, 325 U.S. 797, 807-08 (1945); Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541, 544-56 (9th Cir. 1974) (tracing history of statutory exemption).

Plaintiff's s 2 claim, however, makes no allegation that defendants have combined with any non-labor group to engage in the sham petitioning upon which the monopolization claim is founded.[15] Plaintiff complains that the unions and their attorneys participated in certain permit

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[15] Plaintiff's conclusory allegation that defendants are "co-conspirators" with project developers and union subcontractors is simply insufficient. There is no pleading of the actual involvement of any union subcontractor. With regard to the project developers, not only is the pleading insufficient, but the Court is skeptical that any developer would actually file sham petitions against their own projects.

proceedings. Without some allegation that non-labor groups were involved in the petitioning activity alleged to constitute a monopoly, that activity is exempt from the antitrust statutes as a matter of law. See also USS-Posco Industries v. Contra Costa Bldg. & Constr. Trades Council, 1990 WL 142457, 1990 U.S. Dist. LEXIS 11,360 (N.D. Cal. 1990) (allegedly sham challenges to the construction of the UPI plant on environmental grounds fall within the statutory exemption as long as unions did not combine with non-labor groups).[16]

3. Plaintiff Has Failed To Plead Any Meritless Proceeding.

*11 Plaintiff has premises its monopolization claim upon the theory that defendants engaged in sham petitions and baseless environmental objections. The Court cautioned plaintiff in its April 30 Order that the original complaint did not provide adequate factual support for such a claim. Plaintiff's second amended complaint is no improvement. It fails to allege that defendants have threatened or pursued a single meritless objection to any construction project, much less identify that objection or allege why such an objection should be considered meritless.

In Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1079-83 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977), McDonald's Restaurants sued labor unions and associations of employers in antitrust, alleging

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[16] Again, the Court made plaintiff aware of this requirement in its Order of July 30, in which plaintiff was directed to plead the involvement of non-labor groups in order to state an antitrust claim.

that they opposed each permit granted to McDonald's in an attempt to foreclose McDonald's from access to the Board of Permit Appeals. In affirming the district court's dismissal and denial of leave to amend, the Ninth Circuit noted that [t]he complaint fails to adduce any specific facts to support the conclusory allegation that defendants' opposition before the Board was 'sham' or 'frivolous.' Id. at 1079.

Rather, mindful of the important issues of first amendment rights implicated in challenges to public participation, the Franchise Realty court established a procedural rule requiring the pleading of specific facts in such challenges: [W]here a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required. Id. at 1082-83. See also Boone v. Redevelopment Agency of San Jose, 841 F.2d 886, 894 (9th Cir.), cert. denied, 488 U.S. 965 (1988).

As in Franchise Realty, plaintiff has failed to allege facts with particularity. The pleadings with respect to each of the four projects referred to by plaintiff earlier are insufficient. For the General Electric Project, plaintiff alleges only "threats of permit delay," not what threats were made or whether or not they had merit. For the Gotaverken project, plaintiff alleges that a union threatened environmental objections, again with no faction description of the threat, the objection or its merit or lack thereof. The GWF project contains no reference to any acts of public participation at all. Finally, for Chevron, plaintiff only refers to "environmental impact objections as well as other permit objections" without any further factual descriptions or explanations.

There is simply nothing remotely improper about filing environmental or other objections. Without something more, plaintiff fails to satisfy the Franchise Realty rule, and the continued vitality of this lawsuit would unjustifiably intrude upon defendants' rights to participate in public proceedings.

*12 Accordingly, because plaintiff has failed to state a claim under s 2 of the Sherman Act for the above three reasons, those claims must be, and are

HEREBY DISMISSED.

DISMISSAL MUST BE WITH PREJUDICE

For the following reasons, plaintiff's claims are DISMISSED WITH PREJUDICE: multiple amendments have already been attempted; the Court's specific admonitions to the plaintiff have not been heeded; and the potential chilling effect on the right to petition guaranteed by the first amendment. First, if this Court were to allow plaintiff leave to amend, plaintiff's next attempt would be its fourth. See Mir v. Fosburg, 646 F.2d 342, 347 (9th Cir. 1980) (district court has broad discretion to grant or deny leave to amend, particularly where the court has already given a plaintiff one or more opportunities to amend). See also Fidelity Financial Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1438 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987) (the district court's discretion to deny leave to amend is particularly broad where the court has already given the plaintiff an opportunity to amend its complaint).

Moreover, the plaintiff has been unable to cure its defective pleadings in spite of this Court's specific instructions, making dismissal with prejudice proper. Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160-61

(9th Cir. 1989) (where a district court has issued an order explaining in detail the bases for its dismissal and directed the plaintiff as to how to properly allege a claim, a second amended complaint that still fails to state a claim is properly dismissed with prejudice); Barger v. Playboy Enterprises, Inc., 564 F.Supp. 1151, 1155 (N.D. Cal. 1983), aff'd, 732 F.2d 163 (9th Cir.), cert. denied, 469 U.S. 853 (1984) (dismissal with prejudice proper because plaintiffs had been put on notice by the court of pleading requirements and failed to cure defects). Plaintiff's failure to cure these defects despite this Court's direction leaves the Court highly skeptical of plaintiff's ability to allege the facts necessary to state a viable claim.

Finally, the parties have disputed whether or not this suit may fairly be characterized as a SLAPP suit. Irrespective of whether that label fits, the Court is mindful that the pendency of this suit, both in litigation costs and threats of treble damages, could have the effect of chilling the defendants' rights to public participation. As such, and in view of the ample opportunities afforded plaintiff to state a cognizable claim, dismissal with prejudice is warranted. Franchise Realty, 542 F.2d at 1085-86 (denying leave to file a second amended complaint alleging antitrust violations from unions' participation in permit proceedings); Barger, 564 F.Supp. at 1155 ("[i]n view of the burden on defendant's exercise of its First Amendment rights which would be imposed by unnecessarily prolonging this litigation, the complaint is dismissed with prejudice . . . ."). [17] Accordingly, the above-

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[17] The Court also notes that in oral argument, plaintiff did not seek leave to amend, but rather chose to stand on its current complaint. Plaintiff did so fully aware of the Court's indication in oral argument that this case ought to be dismissed and an appeal taken, if necessary.

captioned matter is HEREBY DISMISSED WITH PREJUDICE.

CONCLUSION

*13 For the above stated reasons, defendants' motion to dismiss is GRANTED and the complaint is accordingly

DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

APPENDIX C

[Filed Nov 19 1993]

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-15511

D.C. No. CV-90-03628-EFL

PETROCHEM INSULATION, INC.,

Plaintiff-Appellant,

v.

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE UNITED STATES & CANADA, LOCAL UNION NO. 38, AFL-CIO; THOMAS R. ADAMS; ADAMS & BROADWELL; THOMAS J. HUNTER; NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, District Council 51, et al.; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 437, 444, 447, 460, 471, 483, 492, 503 AND 662,

Defendants-Appellees.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 302, amicus,

Amicus.

ORDER

Before; KOZINSKI, THOMPSON, and T.G. NELSON, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing, to reject the suggestion for rehearing en banc, and to reject the request for en banc consideration of this court's August 6, 1993 order.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestions for rehearing en banc are rejected.

APPENDIX D

[Filed Aug 6 1993]

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-15511

D.C. No. CV-90-03628-EFL

PETROCHEM INSULATION, INC.,

Plaintiff-Appellant,

v.

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE UNITED STATES & CANADA, LOCAL UNION NO. 38, AFL-CIO; THOMAS R. ADAMS; ADAMS & BROADWELL; THOMAS J. HUNTER; NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, District Council 51, et al.; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 437, 444, 447, 460, 471, 483, 492, 503 AND 662,

Defendants-Appellees.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 302, amicus,

Amicus.

ORDER

Before; KOZINSKI, THOMPSON, and T.G. NELSON, Circuit Judges.

Appellees' Motion to Dismiss the Appeal is granted in part. Insofar as the appeal attempts to challenge the validity of the District Court's order dated April 30, 1991, it is DISMISSED. *Loux v. Rhay,* 375 F.2d 55 (9th Cir. 1967). The other issues raised will remain on the oral argument calendar as previously scheduled.

APPENDIX E

[Filed Sep 3 1991]

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION NO.: C-90-3628-EFL-ENE

PETROCHEM INSULATION, INC.,

Plaintiff,

v.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, District Council 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES

AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER,

Defendants.

SECOND AMENDED COMPLAINT FOR DAMAGES AND INJUNCTION AGAINST DEMANDING UNLAWFUL AGREEMENTS IN EXCHANGE FOR WAIVING ENVIRONMENTAL AND PERMIT OBJECTIONS (Jury Demanded)

15 U.S.C. §§1-2 and 18 U.S.C. §1961 et seq.

Plaintiff Petrochem Insulation, Inc. ("Petrochem"), brings this action for damages and permanent injunctive relief under the federal antitrust laws and anti-racketeering laws against Defendants; Northern California and Northern Nevada Pipe Trades Council, District Council 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the "District Council" or "District Council 51"); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Unions 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662 ("Local [number]" or, collectively, the "Locals"); Thomas R. Adams ("Tom Adams"); Thomas R. Adams, P.C. ("Adams, P.C."); Adams & Broadwell, P.C. ("Adams & Broadwell") (Tom Adams, Adams, P.C., and Adams & Broadwell are collectively referred to as

"Adams"); and Thomas J. Hunter ("Hunter"). Plaintiff alleges as follows:

JURISDICTION

1. This court has jurisdiction of the subject matter pursuant to Sections 4 and 14 of the Clayton Act (15 U.S.C. § § 4 and 14) for violations of the Sherman Antitrust Act, (15 U.S.C. § § 1 and 2) and 18 U.S.C. § 1964(c) for violations of the Racketeering Influence and Corrupt Organization Act, (18 U.S.C. § § 1962 and 1965(a)).

2. This court also has jurisdiction of the subject matter by virtue of 28 U.S.C. § § 1331 and 1337 in that this is a civil action arising under the laws of the United States as set forth above.

VENUE

3. Venue is proper in this court by virtue of 28 U.S.C. § 1391(b) in that the claims asserted herein arose in material part in this district.

4. Venue is also proper in this court in that the Defendants are found, have agents, or transact their affairs within this district.

GENERAL NATURE OF THE CASE

5. The first cause of action is for alleged violations of the federal anti-trust laws by the Defendants' conspiracy and combination with construction project owners (who are not employers in the construction industry, do not self-perform the construction work, and who have no collective bargaining relationship with Defendants) to enter into unlawful "hot cargo" agreements, thereby precluding the plaintiff from either bidding for or competing for work on large industrial construction projects.

6. The second cause of action is an alleged violation of the federal anti-trust laws arising out of the Defendants' monopolization of the market and restraint of trade through the use of sham petitioning, filing environmental objections with or without probable cause, and regardless of the merits of the cases as a means of imposing delay and cost and adverse publicity and otherwise attempting to use governmental process, rather than the result of that process, as an anti-competitive weapon.

7. The remaining causes of action are for violations of the provisions of the Racketeering Influenced and Corrupted Organizations (RICO) Acts predicated on payments from employers to a union in violation of the Section 302 of the Taft-Hartley Act, 29 U.S.C. §186. The RICO violation arises from the establishment of the Bidder Information and Directory Service ("BIDS"), which functions as a common sales force for signatory contractors, similar to a labor-management cooperative committee, but is not separately maintained, nor jointly administered. BIDS is financed in whole by funds which are employer payments to a union in violation of 29 U.S.C. §186.

PARTIES

8. Petrochem is a California Corporation with its principal place of business in Vallejo, Solano County, California. Petrochem maintains branch offices in both Southern California and the State of Washington. Petrochem is a mechanical insulation contractor specializing in power plant and industrial construction. It is not signatory to collective bargaining agreements. Nor has Petrochem recognized any labor organization as the majority representative of its employees. Although the majority of Petrochem's business is conducted within

California, Petrochem routinely competes for and performs construction and insulation contracts throughout the entire United States on new and rehabilitated industrial construction projects, as well as maintenance work. Petrochem routinely submits bidding proposals in competition with other contractors who are both signatory and not signatory with labor organizations as well as contractors who are exclusively signatory with the Local Union Defendants in this action. The projects for which Petrochem submits bids routinely process goods and material supplied from outside the State of California for use both in the State of California and other States.

9. District Council 51 is a labor organization with headquarters at 1350 Bayshore Highway, Burlingame, California 94010. District Council 51 is an unincorporated association whose members include the Locals. The Council came into existence prior to 1985 as an informal group consisting of the Locals. At that time it was known as the Northern California and Northern Nevada Pipe Trades Council. In 1988, the Council obtained a charter as District Council Number 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Thomas Hunter is the Business Manager of District Council 51.

10. Defendant Local Union 62 is a labor organization with headquarters at 778 Hawthorne Street, Monterey, California 93940. John E. Bandarra is the Business Manager of Local 62.

11. Defendant, Local Union 159 is a labor organization with headquarters at 1308 Roman Way, Martinez, California 94553. Edward K. Anschutz is the Treasurer of Local 159.

12. Defendant, Local Union 228 is a labor organization with headquarters at 719 Sutter Street, Yuba City, California 95991. William R. Douthat is the Business Manager of Local 228.

13. Defendant, Local Union 246 is a labor organization with headquarters at 4831 East Shields Street, Fresno, California 93726. Robert Ward is the Business Manager of Local 246.

14. Defendant, Local Union 342 is a labor organization with headquarters at 1030 Shary Circle, Concord, California 94518. John A. Matheis is the Business Manager of Local 342.

15. Defendant, Local Union 343 is a labor organization with headquarters at 401 Nebraska Street, Vallejo, California 94590. Michael Beavers is the Business Manager of Local 343.

16. Defendant, Local Union 350 is a labor organization with headquarters at 110 Greg Street, Sparks, Nevada 89431. George Foster is the Business Manager of Local 350.

17. Defendant, Local Union 375 is a labor organization with headquarters at 2920 Soqual Avenue, Santa Cruz, California 95062. William Kirby is the Business Manager of Local 365.

18. Defendant, Local Union 393 is a labor organization with headquarters at 370 Umbarger Road, San Jose, California 95111. Robert Duffey is the Business Manager of Local 393.

19. Defendant, Local Union 437 is a labor organization with headquarters at 1340 Lone Palm Avenue, Modesto, California 95351. Preston Oliver is the Business Manager of Local 437.

20. Defendant, Local Union 444 is a labor organization with headquarters at 2960 Merced Street, San Leandro, California 94577. Charles E. Fugel is the Business Manager of Local 444.

21. Defendant, Local Union 447 is a labor organization with headquarters at 5841 Newman Court, Sacramento, California 95819. William Rhoten is the Financial Secretary of Local 447.

22. Defendant, Local Union 460 is a labor organization with headquarters at 6718 Meany Ave., Bakersfield, California 93308. John J. Mickelson is the Business Manager of Local 460.

23. Defendant, Local Union 467 is a labor organization with headquarters at 1519 Rollins Road, Burlingame, California 94010. Gary Saunder is the Business Manager of Local 467.

24. Defendant, Local Union 471 is a labor organization with headquarters at 832 E Street, Eureka, California 95501. Gary Haberman is the Business Manager of Local 471.

25. Defendant, Local Union 483 is a labor organization with headquarters at 46 Ingold Rd., Suite D, Burlingame, California 94010. Lloyd Barton is the Business Manager of Local 483.

26. Defendant, Local Union 492 is a labor organization with headquarters at 3935 Coronado Avenue, Stockton, California 95204. Joe Winstead is the Business Manager of Local 492.

27. Defendant, Local Union 503 is a labor organization with headquarters at 117 Pajaro Street, Salinas, California 93901. Robert Howard is the Secretary/Treasurer of Local 503.

28. Defendant, Local Union 662 is a labor organization with headquarters at 904 Locust St., Rm. S., Redding, California 96001. Thomas L. Jackson is the Business Manager of Local 662.

29. Tom Adams is an individual resising in or near San Mateo, California. Tom Adams' customary place of business is at Adams & Broadwell, P.C., 1875 South Grant Street, Suite 600, San Mateo, California, 94002-2662. Tom Adams is the President and sole shareholder of Thomas R. Adams, P.C. and an officer of Adams & Broadwell.

30. Adams, P.C. is a California professional law corporation with its principal place of business at Adams & Broadwell, P.C., 1875 South Grant Street, Suite 600, San Mateo, California, 94402-2662. Adams, P.C. is a shareholder in Adams & Broadwell.

31. Adams & Broadwell is a California professional law corporation with its principal place of business at 1875 South Grant Street, Suite 600, San Mateo, California, 94402-2662.

32. Tom Hunter is an individual residing at 3334 Lower Loch Street, Belmont, California 94002. Hunter is Business Manager of District Council 51.

CO-CONSPIRATORS

33. Other labor organizations, and other businesses not sued as defendants herein, have conspired and continue to conspire with Defendants in the illegal conspiracy in restraint of trade alleged in the first and second causes of action. These businesses and labor organizations fall into three categories.

a. The developers or owners of the cogeneration, industrial and petrochemical construction projects who are not engaged in the construction industry, do not self-perform these construction contracts, and who had no collective bargaining agreements with the defendants herein prior to entering into the "hot cargo" agreements;

b. Subcontractors who are signatory to collective bargaining agreements with the above listed defendants or who are signatory with other labor unions but also are direct competitors of Petrochem's such as Armstrong Cork and Supply, Performance Contracting, Plant Insulation, Rogers Insulation and Western MacArthur Company.

c. Other labor organizations, including regional building trades councils and labor councils, District Council 16 of the Southern California Pipe Trades Council, all members of the San Francisco, San Mateo and Contra Costa Building Trades, and Asbestos Workers Local 16, as well as others not yet known to Plaintiff.

34. When both defendants and such co-conspirators known and unknown are referred to jointly, they are called herein "co-conspirators".

RELEVANT MARKET

35. The relevant market is comprised of construction sub-contracts for the installation of piping and insulation in industrial, manufacturing, petrochemical, and cogeneration facilities throughout Northern and Central California, including maintenance contracts and remodelling work.

36. Petrochem's competitors for this market consist mainly of the following contractors: ACS (Armstrong Cork and Supply), Performance Insulation, Plant Insula-

tion, Rogers Insulation and Western MacArthur Co., which are all union signatory contractors; and Pem Insulation, Concord Engineering and Pencon Insulation, which are open shop (non-union) contractors.

37. In the last four years, the vast majority of the projects within the relevant geographic and product market are those which were listed in pages 28 through 30 of the video transcript attached as Exhibit 1. Those projects are:

Wadham Energy Project, Smith River Biomass, Cal Ag Biomass, Mendota Biomass Power, Sunflower Valley Energy, Delano Energy Project, Capco-Madera Power Project, Capco II, Valley Power Assn. Hawrwood Cogeneration Facility, Western Forest Products Biomass Power Plant, Soledad Ecology Power I, Tedco Biomass, Power Plant, Crockett Cogeneration Plant, Chevron Richmond Cogeneration, GWF 1, GWF 2, Agrico Cogeneration Plant, California Agricultural Power Corporation Cogeneration, Western Power Systems Development, Sierra Pacific Industries Cogen, Simpson Paper Company Cogeneration Power Plant, Rio Bravo Posso, Rio Bravo Jasmin Cogeneration Plant, U.S. Borax Cogeneration Plant, South Belridge Cogeneration Plant, Midway-Sunset Cogeneration Plant, Caterpillar Capitol Cogeneration Plant, University Energy Cogeneration Plant, Combined Energy Cogeneration Plant, Mount Posen Cogeneration Plant, Kern Front Cogeneration Plant, Santa Fe Energy Cogen, High Sierra Cogen, Kern Island Cogen, J.R. Wood Fruit Cogen, American Cogen 1, Marport 1 and Marport 2, Agnews Cogen Facility, Station T, California Bioresources II, Sierra Pacific Industries Cogen, Sierra Pacific Mill Cogen, San Joaquin Cogen, City of Tracy Cogen, Basic American Cogen, Greenleaf Power 1 and 2, Norcal Foods Cogen, Navy, Units

II and II, BLM I and II, Navy II, Unit I, West Ford Flat Plant, 19, SAI Geothermal Nos. 1, 2 and 3, PG & E No. 21, Bear Canyon Phase II, Honeylake Hybrid Power Plant, Mammoth/Chance Project, Mobil Oil San Ardo Cogen, Tri-Cities Solid Waste, BARA site 1 and Site 3, Bay Area Resource Recovery Facility, and Modesto Tire to Energy Facility.

38. Other projects within the relevant market were also discussed in the video such as the Allied Signal Corporation's 50 Megawatt Biomass Power Plant in Shasta County (known as the Cottonwood Power Plant), the General Electric 27 Megawatt Facility at Burney, California (known as the Burney Cogen), the Clear Creek Cogen south of Redding, the Woodland Cogen Project north of Sacramento, California, the $400 million NEC plant expansion in Roseville, the Bakersfield Chevron Cogen, the China Lake Geo-Thermal Project consisting of six Cogeneration plants for a company called PS&E, the GWF cogeneration plant in Hanford, California, and five other GWF Cogeneration projects in Contra Costa and Solano Counties, the $400 million Chevron Burnout unit, and the Benjamin Moore Plant in Solano County, California. In addition, the relevant market includes several Chevron Richmond Refinery projects, including the upcoming modernization TKC and lube oil/cracker plants, Unocal Refinery work in Santa Maria, Dow Chemical upgrades in Contra Costa County and the USS-POSCO project in Pittsburg, California.

MONOPOLIZATION BY SHAM PETITIONING

39. Over the last four years, District Council 51, Hunter, Adams, the members of District Council 51, Local Union Numbers 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503,

662 and others have devised and executed a plan to exclude open shop contractors like Petrochem in an attempt to monopolize the relevant market by means of sham petitioning and threats of sham petitioning directed at the customers of open shop contractors. Defendants have named this plan "Job and Community Protection Program," or the "Tom Adams Program". Co-conspirators Asbestos Workers Local 16 as well as all the members of the San Francisco, San Mateo and Contra Costa Building Trades agreed to join the Tom Adams program in 1987.

40. The essence of the Tom Adams Program is sham petitioning and threats of sham petitioning of local and state governmental agencies and entities connected with building and use permit process. The sham petitions cause, or threaten to cause, delay of the start-up of large construction projects and the delay, or threat of delay, is used to economically coerce developers and project owners to exclude non-union contractors like Petrochem in exchange for the withdrawal of, or not filing of, environmental and building, use, or zoning permit objections.

41. Defendants file building, use, zoning or environmental objections to permit applications for the sole and exclusive purpose of forcing Petrochem's customers to enter into agreements, express and implied, with Defendants to cease doing business with Petrochem and other open shop contractors. The objections are filed in forums that do not have the legal authority to exclude Petrochem as a subcontractor nor are the petitioned governmental agencies directly asked to exclude Petrochem or other non-union contractors from the market.

42. Instead, the Defendants rely upon publicity created by the filing of the objections, coupled with the

attendant delay, as well as Defendants' statements to owners or developers that they will withdraw the objections in exchange for agreements to use union-only construction contractors.

43. Defendants not only know that these objections are not truly intended to achieve a legitimate purpose but have designed this process in order to skirt labor and anti-trust laws as a means of securing union-only project agreements.

44. The project owners and developers in this market (and who are customers or potential customers of Petrochem) are not engaged in the construction industry, are not construction employers, and do not self-perform the construction of these projects. Nor do they have past or current collective bargaining relationships with any of the defendants herein at the time they filed for building or use permits.

45. The Locals have agreed, either directly or through Adams, to intervene in permitting processes incident to construction projects in Northern California, or to threaten to intervene in such proceedings, for the purpose described above. Adams has agreed to act as the agent for District 51 and for the Locals in advocating objections before regulatory and administrative agencies with jurisdiction over such projects, without regard to the merit of the positions advocated and with knowledge that the object was not to obtain relief from the agencies, but to compel project developers and/or general contractors to require the use of union subcontractors. Defendants have also expressly threatened to file and to press objections, regardless of merit, until owners enter into agreements to boycott Plaintiff. Hunter has agreed to coordinate the anti-competitive activities described in this complaint and to convey to project developers and general contractors the threats described above.

PATTERN OF MONOPOLIZATION

46. *Allied Signal.* One of the earliest targets of the Tom Adams Program was Allied Signal Corporation. In 1986, Allied Signal, through its subsidiary, Signal Energy Systems, sought to build a biomass energy facility, to be known as the Cottonwood Energy Facility, in Anderson, California.

47. District 51 and Local 662 intervened in the air quality permit proceedings. Adams repeatedly petitioned the relevant administrative bodies, (for example objections filed before the California Energy Commission, Case No. 86-C&I-7, dismissed in 1988), and ultimately the courts, with a large number of objections. Defendants were perfectly aware that they "had a loser" (to quote Hunter) on the merits. Nevertheless, Adams continued with these objections, through various appeals and into the courts, causing significant delays and inconvenience to Allied Signal.

48. This effort to harass and delay Allied Signal was continued long after it was clear that Defendants' claims had no merit. According to Defendant Hunter, as stated in Exhibit 1, the reason for this effort was to demonstrate to other developers that there was, as Hunter stated, "no end to it" and that the unions would continue to harass and delay such projects throughout their life. In short, Allied Signal was to be an "object lesson" for the industry.

49. On or about January, 1988, after much litigation in which Allied prevailed in the lower courts, Allied Signal entered into a settlement of this case with Defendant District Council 51, which finally allowed Allied to complete construction and resume operations. In consideration for this settlement, Allied agreed to use only union

signatory contractors to build two additional facilities, both at the Shasta-Cottonwood projects. In addition, Allied learned that as a result of Defendants' sham petitioning, its projects would be significantly delayed and that it could avoid this type of sham environmental petitioning if its simply agreed to use union signatory contractors on future work, regardless of the environmental merits of the project and regardless of the increased cost to its project.

50. In the Defendants' own videotape presentation and press articles, they state that . . . "Though the Shasta plant was built non-union, Allied Signal agreed to use union labor in building six other plants in California". According to Defendants, in their press releases, Allied Signal agreed to install additional construction to be built by one or more of the Locals in order to prevent the project from becoming hopelessly delayed. Tom Adams admitted publicly that the point was not to win this particular "battle" but to win the war by intimidating other developers and owners of similar projects that if they used non-signatory construction companies, then their projects would be held up by environmental and permit objections that would not be filed as long as the developers used union signatory contractors.

51. According to Defendants, Union threats of intervention in the permitting process have resulted in obtaining union-only contracts for all the projects enumerated in paragraph 37 and most of the projects listed in paragraph 38 of this Complaint. On or about May 9, 1991, Defendant Tom Adams announced at the convention of the California State Pipe Trades Council that ". . . involvement in permits netted more than 1.2 million hours of work for members." According to Defendants, threats

of sham petioning obtained the contracts for all of the locals enumerated as Defendants in this action.

52. *The Burney Cogeneration Project.* The pattern established in Allied Signal was repeated on other projects. In 1988, shortly after the Allied Signal incident, officials of Defendant Local 662 discovered that General Electric sought to construct a 27 megawatt energy facility in Burney, California, a project which would require some 230,000 man-hours of work. General Electric originally intended to build this facility using an open shop contractor.

53. After discussing the matter with District 51, Local 662 contacted the project developer and threatened "a major job action", including sham petitions, equivalent to the Allied Signal affair, together with mass picketing and violence.

54. By March 28, 1988, Petrochem had already bid and been awarded three separate insulation contracts at projects which General Electric Corporation was building. Those projects, commonly known as CAPCO 1 and CAPCO 2, were located in El Nido and Chowchilla, California, respectively and a third plant located at Wesley, California. Petrochem successfully completed these projects. As a result, Petrochem was invited to bid on the General Electric Burney Cogeneration project described previously.

55. Because of the threats of permit delay by Local 662, acting in concert with the other Defendants, and pointing to the experience at Allied Signal, General Electric agreed with Defendants to boycott open-shop contractors. Petrochem would have received this contract, but as a direct and proximate result of Defendants' use of the Tom Adams Program, suffered $200,000 in

lost profits. The union contractor which received the subcontract for this project was Performance Contracting located in Sacramento, California and which is union signatory.

56. *The Woodland Cogeneration Project.* In 1988, Thermo Electron Corporation proposed to build a biomass cogeneration facility in Woodland, California. In this case, the company had originally projected a $50,000,000 cost, with permitting to be completed by early 1988. Due to the efforts of Local 447, Adams, Hunter, and the District Council, permitting was significantly delayed until Local 447 contractors obtained the work. The total ultimate cost of the project was $80,000,000. On information and belief, Defendants Adams, District Council 51 and other Defendants were able to take advantage of the fact that permanent financing for the project from the Bank of Boston was delayed until the permit questions had been resolved.

57. On or about July 28, 1988, Petrochem bid and was awarded a subcontract for insulation work to be performed on a project to be known as the Mendota Biomass Power Project. The developer of the project was Thermo Electron Corporation. Thermo Electron hired Gotaverken Energy Systems of Charlotte, North Carolina to supply the necessary design and engineering work and to arrange for the actual construction. Neither Thermo Electron nor Gotaverken is an employer of construction labor. The subcontract price for Petrochem's portion of the work was $650,000. By the end of January, 1989, the Mendota project was successfully completed to Gotaverken's satisfaction.

58. As noted above, Gotaverken was also selected by Thermo Electron to play the same role for Thermo Elec-

tron's biomass cogeneration facility in Woodland, California, described above. Gotaverken then solicited bids for this project. The Woodland project was identical in size, physical plant and construction cost to the Mendota Biomass project. Because of Petrochem's excellent past performance on the Mendota project, Gotaverken requested that Petrochem bid for the Woodland project.

59. Before formal bids could be submitted on the Woodland Project, and after consulting with Adams, Hunter, the District Council and Local 447 approached Gotaverken. William Rhoten, Business Manager of Local 447, threatened Gotaverken that it would file environmental objections and delay the project if Gotaverken retained Petrochem or any other open-shop contractor.

60. As a result of these threats, on or about September 1, 1988, Gotaverken signed an agreement prohibiting Gotaverken from using or retaining open-shop contractors. Thus Petrochem was prohibited from submitting a bid or being awarded the contract.

61. Petrochem would have been awarded the contract, based on its past performance with Gotaverken, had it been permitted to bid. As a direct and proximate result of the threats of Local 447 and the conspiracy of Defendants which supported it, the subcontract award went to a firm named API, out of the state of Minnesota and Petrochem lost profits of $110,500.

62. *The NEC Plant Expansion.* The Tom Adams Program pattern is further exhibited by a $400 million dollar plant expansion by NBC Corporation in Roseville, California which was obtained by Local 447 using the Tom Adams Program. According to a newspaper report in the Sacramento Bee, the unions openly boasted that NEC agreed to construct the plant with union signatory

contractors only, and to deny non-union contractors the opportunity to bid the work, because of threatened intervention by Adams on behalf of the Defendants in the permit process.

63. A number of other projects have fallen victim to the Tom Adams Program and its pattern of sham petitioning, such as:

a. The Freeport-McMoran Geothermal Projects wherein Local Union 460 and District Council 51 initiated air quality objections and openly threatened to continue other permit and environmental objections in public hearings;

b. the China Lake geothermal facility where Local 460, Adams, and District 51 prosecuted permit objections before the California Energy Commission and forced the project engineering company to replace the open shop general contractor TIC'S employees, with a union employees;

c. a construction project in Fresno, California (through Local 246) owned by GWF Corporation;

d. a series of nine cogeneration plants, including the Kern Bluff Cogeneration Plant, near Bakersfield, California (through Local 460); and

e. Defendants have also claimed that five unnamed additional cogeneration projects were obtained as a direct result of the Allied Signal effort and the Tom Adams Program.

64. *The GWF Cogeneration Plants.* On or about June 15, 1988, Petrochem was contacted by M.W. Kellogg Company, design engineers for an energy producer, GWF Power Systems Company, Inc. Petrochem was informed that GWF planned to build five separate cogen-

eration plants in and around Pittsburg and Antioch, California. Neither GWF nor Kellogg would directly hire their own craft employees. Instead, all craft work would be subcontracted through a general procurement agent, National Energy Constructors. Kellogg asked Petrochem to prepare budget projections for the insulation work on these projects. Petrochem prepared the requested projections.

65. On or about July 1, 1998, after Petrochem had submitted its cost projections, GWF contacted Petrochem and informed Petrochem that the project was now a union-only contract and that unless Petrochem employed union labor, it would not be permitted to competitively bid much less perform the insulation contract. Unknown to Petrochem, in March, 1988 Defendant Local 549 through its Business Manager, had already coerced GWF into signing a union-only agreement which resulted in the insulation subcontract being awarded to a union contractor, Plant Insulation of Emeryville, California at a higher cost than would have been bid by Petrochem. On or about March 19, 1988, Defendant Steamfitters Local 342's Business Manager John Matheis wrote in the Contra Costa Labor News that "I signed a project agreement for the Five Co-Generation Units along the water, commonly referred to as the GWF-Co-GENS. ."

66. Attached hereto as "Exhibit 2" is a position paper entitled "Participation in the Permit Process – 1987" by Tom Hunter of Defendant District Council 51 and Ray Forman of United Association of Pipe Trades, District 16, which details the pattern of obtaining agreements by sham petitions or the threat of sham petitions to achieve unlawful restraints on trade. As the paper states, inter alia:

". . . The developers [of the GWF Cogeneration Plants in Contra Costa County] approached District 51 and the Contra Costa Building Trades Council for project agreements. They had heard of District Council 51's activities with respect to the Signal project in Shasta County and the activities of both groups with respect to the USS-Posco project . . . . [i]t is now expected that this project will use entirely union construction workers.

In response to our concerns about employment impacts [on the GWF Cogeneration Plants in Fresno], negotiations for project agreements for these two projects have commenced.

District 51 and Local 492 initiated an investigation of this project [Thermal Energy Development: San Joaquin County]. Subsequently, the project developer met with the local Building Trades and entered into a project agreement . . . . We did not submit environmental comments on the project.

We have repeatedly expressed our concerns about economic issues because Presley is generally non-union."

67. As a direct and proximate result of Defendants' anti-trust and conspiracy with non-labor groups, Petrochem was effectively boycotted from the GWF cogeneration plants bidding process and lost its ability to compete for contracts on these five separate plants.

68. *USX-(USS) POSCO:* According to Tom Adams in published press articles, the Building Construction Trades, which includes Defendants herein, offered to enter into a project agreement with the USS-Posco plant modernization in Pittsburg, California on or about February 1987. One day after USS-Posco announced that it refused to enter into a project agreement, "Adams said

the unions may attempt to stop USS-Posco from obtaining land use, hazardous waste and other permits it needs to operate the plant", according to the Oakland Tribune. In a March 16, 1987 story appearing in the Los Angeles Times, Tom Adams indicated "that he is prepared to tie up the project for years with lawsuits on land use, water and hazardous waste permits". In September 1987 edition of the Contra Costa Labor News, Defendant Steamfitters Local 342 Business Manager John Matheis admits that "the Contra Costa Building Trades Council is still working with the [Tom Adams] program to try and make the steel mill expansion job union."

69. *The Chevron Modernization Project.* Petrochem has enjoyed a long and productive working relationship with Chevron, Inc., an international oil and chemical producer, and owner of oil and energy production plants. On or about April 1, 1990, Chevron, Inc. began soliciting qualified subcontractors for a project known as the Modernization project in Richmond, California. This project was related to a major refinery overhaul, at a total cost of over one billion dollars and which was the target of environmental impact objection threats as early as 1988.

70. In December 1987, the Business Manager of Local 342 coerced Nooter Company into agreeing to sign a union-only project agreement for work in the Chevron Refinery when Nooter was never signatory with that local union. Because of Defendant Local 342's threats of permit delay, the local was able to guarantee a favored competitor of Petrochem's that it would be the chosen subcontractor for future work on this project. In October or November of 1988 Defendant Thomas Adams met with a senior Chevron Refinery official and threatened to file environmental impact objections as well as other permit

objections on the project unless Chevron directly signed a union-only project agreement. Chevron, through its official, declined to do so at that time.

71. Chevron is not itself engaged in the construction industry and had expressed interest in retaining Brown & Root, U.S.A., of Houston, Texas, an open-shop contractor, as the general contractor. On or about April 5, 1990, Chevron sent Petrochem a pre-qualification questionnaire as a preliminary step in the bidding process.

72. Between the time Petrochem received the questionnaire and the time for bids to be submitted, Adams, acting on behalf of the District Council, again threatened Chevron with delays in construction start-up by filing environmental impact objections. Chevron was told if Chevron agreed to use only union subcontractors, the environmental objections would not be filed. According to Defendants' own video, the Union also threatened Chevron with delay in obtaining use permits and a history of repeated mass picketing and violence as had occurred at the USS-Posco plant in Pittsburg, Contra Costa County, California.

73. Chevron retained Fluor Corporation to attempt to negotiate a compromise with the District Council. However, the Defendants refused to compromise. On or about June 15, 1990, Chevron capitulated. At that time Chevron either signed or agreed to sign a mandatory union-only contract for the construction of the Modernization project or agreed to retain a general contractor who would be required to sign such an agreement, thereby precluding Petrochem from bidding on the project. At first, the project agreement was believed not to cover approximately $300 million of "off site" work, but was later extended to off site work in exchange for union

promises not to cause delay by environmental and permit objections.

74. Had Petrochem been allowed to bid, it would have been awarded the Modernization insulation project contract. As a direct and proximate result of Defendants' threats and conspiracy, Petrochem lost $800,000 in lost profits from the Modernization project.

THREATS AND USE OF SHAM PETITIONING TO DIVULGE TRADE SECRETS

75. In addition to sham petitioning, the Tom Adams program also includes the tactic of requiring owners to file trade secret and proprietary information in order to rebut permit challenges, and then requesting under the California Public Documents Act, copies of the secret information. For example, District 51 requested the proprietary information about ARCO's new low emission fuel to be produced in the Carson, California facility. Adams has refused to allow reasonable restrictions on the use of this information, or the limitation in emissions in the permit, in lieu of receiving the information. Disclosure of the information is directly designed to damage ARCO for having chosen a non-signatory contractor to build its new plant in Carson.

USE OF PUBLICITY OF SHAM PETITIONING FOR MONOPOLIZATION

76. In the last five years, Defendants have employed the Tom Adams Program to compel the retention of union contractors (and to exclude participation by open-shop subcontractors such as Petrochem) in dozens of Northern California construction projects. Defendants have prepared both written and videotaped propa-

ganda describing the operation of the Tom Adams Program, which they have caused to be disseminated to local construction trade unions throughout the United States for re-transmission to owners and developers not engaged in the construction industry. For example, a description of the Tom Adams Program is contained in the article entitled "California Pipe Trades Protecting the Environment" by Chris Bedford, published in the Fall 1988 issue of the Labor Research Review No. 12 (Vol. VII, No. 2, pp. 89-95), a copy of which is attached and annexed hereto as "Exhibit 3".

77. Defendants have expressly, and by implication indicated to owners and developers that they would forbear filing environmental objections if the project were subject to a union agreement. A distinction must be drawn between legitimately expressing environmental concerns to a public entity and using such expression or the threat of such expression as a coercive method to restrain trade. On or about May 9, 1991, Defendant Adams explained the mission of the Tom Adams Program when he spoke to the California Pipe Trades Convention:

> "If there is a nonunion development project seeking environmental permits, we analyze the project to determine whether or not there are objections that can be made to it, and participate extensively in the process. This is an expensive undertaking, but not one without rewards".

Exhibit 1, quotes Defendant Tom Adams as saying:

> "When we become aware of a project that is in the permit process we examine it to determine whether or not there are environmental or planning or other regulatory problems with the project. And if there are meritorious objections that can be raised to a *nonunion* project, we raise them.

> And a lot of times in this process, we, by virtue of the objections we raise, we get concessions from the developer, or the governmental agency imposes conditions on the project which make the project better for the community. And *also a lot of times we convince the developer that, you know, he should enter into an agreement with the unions to make the project union.* Exhibit 1, transcript at page 18. [Emphasis added]

78. By reference, Defendants threaten a range of wrongful taking of property if the project is built non-union. This threat makes reference to traditional secondary boycotts, mass picketing and violence. The threat also refers to denial of permits and coerced signing of pre-hire agreements by owners or developers. As Defendant Tom Hunter states on the video:

> "But Chevron has learned since then, of course, because – not so much of the fight with Signal Energy but because of USX Posco that – the same lesson – that we will not stop. . . . And so Chevron is now dealing with us."

79. Defendants have also engaged in a publicity campaign, ostensibly directed toward union organizing, which is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of Plaintiff. In their video distributed to owners and project developers, Defendants have announced their intention to continue pursuing the sham environmental regulatory activities described in this Complaint as an ongoing and normal means of obtaining union-only subcontracting agreements with owners and developers not engaged in the construction industry and not within the context of a collective bargaining relationship. Defendants' well-publicized use of the Tom Adams

Program has given rise to an implicit threat against all project developers, general contractors, and subcontractors who have any intention of engaging in projects in Northern California in the future. The implicit and explicit threat is that project developers can expect to have their construction projects delayed to the point of economic infeasibility by implementation of the Tom Adams Program unless they ensure that work on the projects is limited exclusively or largely to contractors that have executed agreements with the Locals.

80. After the Allied Signal "conquest", Defendants produced and exhibited the video, transcribed as Exhibit 1, in part to publicize to owners and developers the consequence of retaining non-signatory construction companies. Plaintiff is informed, believes and thereon alleges that some of the projects listed in the video were not constructed pursuant to a union-only contract or were not otherwise subject to the sham petitioning activities described herein. Thus, the true purpose of the Defendants' false statements regarding such projects demonstrates that one of the purposes of the video was to convince other future developers or construction project owners not to use non-union contractors rather than report the truth of past events.

FIRST CAUSE OF ACTION FOR COMBINATION IN RESTRAINT OF TRADE

81. Plaintiff realleges paragraphs 1-80 of the preliminary allegations and reincorporates them by reference as if they were fully set forth herein.

82. Plaintiff is informed, believes based upon Defendants' own claims, and thereon alleges that most of the projects listed in paragraphs 37 and 38 of this Complaint

were projects which became subject to a union-only contract because of Defendants' use of sham petitioning or threats of sham petitioning. As a result, Plaintiff was precluded from competing in this monopolized market.

83. The Sherman Act, 15 U.S.C. § 1 makes it unlawful, inter alia, for any person to enter into a contract or combine with others to make a contract or create a form of trust or conspiracy in restraint of interstate trade or commerce or foreign trade or commerce.

84. District Council 51, the Locals, Adams, and Hunter are all "persons" as defined by 15 U.S.C. § 7.

85. District 51 was originally organized for the purpose of engaging in a variety of activities as agreed upon by its constituent members. Those activities include, but are not limited to, coordination and implementation of the Tom Adams Program. The conspiracy and combination of all Defendants began in or after 1985 and continued after the 1988 formal organization of District Council 51. Since that time all members of the conspiracy and combination have shared the common purpose of excluding, both through lawful and unlawful means, the use of non-union contractors in Northern California construction projects.

86. As detailed above, Defendants have obstructed, affected, delayed and restrained trade and interstate commerce through unlawful combinations, illegal agreements, and impermissible group boycotts obtained by threatening to delay Northern California construction projects, and by actually delaying such projects, by use of sham petitioning efforts. Defendants threatened permit delays unless and until the project developers and/or general contractors agree to boycott open-shop contractors such

as Petrochem and instead to deal only with subcontractors that have collective bargaining or pre-hire agreements with the Locals. Such actions were intended to and did reasonably induce fear of catastrophic economic loss thereby coercing project owners, developers and/or general contractors to agree with Defendants to select subcontractors not on the merits, but on whether such subcontractors have agreed to sign a union contract. As a consequence of Defendants' acts, Petrochem has been denied access to a major segment of its customer market and has suffered damages thereby.

87. As a result of defendants' violation of 15 U.S.C. §1, Petrochem has suffered injury to its business and property. As a result of defendants' pattern of restraint of trade and suppression of competition through which they have conducted anti-competitive activities, Petrochem has been foreclosed from obtaining contracts on construction projects on which it would have earned a profit. In addition, Petrochem has suffered substantial injury to its goodwill and business reputation. Because Petrochem is an open-shop contractor, project developers and general contractors will realize that doing business with Petrochem would subject them to costly interference and delay in the commencement and completion of projects wholly unrelated to Petrochem's conduct and threaten the very viability of such projects.

88. As a direct and proximate result of District Council 51, The Locals, Adams, and Hunter's conduct against Plaintiff, and other open shop contractors, this Plaintiff has been damaged in the sum of $1,110,500.00. Under 15 U.S.C. §15, Plaintiff is entitled to recover from Defendants treble damages and costs of suit, including a reasonable attorney's fee.

SECOND CAUSE OF ACTION FOR MONOPOLIZATION AND ATTEMPT TO MONOPOLIZE

89. Plaintiff repeats and realleges paragraphs 1-80 of the preliminary allegations, and paragraphs 82-88 of the first cause of action inclusive, as if fully set forth herein.

90. The Sherman Act, 15 U.S.C. §2, makes it unlawful to monopolize or attempt to monopolize or conspire or combine to monopolize any part of interstate trade or commerce or foreign trade or commerce.

91. By reason of the Locals' Hunter's, Adams' and District 51's violation of 15 U.S.C. §2, Petrochem has suffered injury to its business and property, loss of goodwill andprofits in an amount of $1,110,500.00.

92. In furtherance of the conspiracies described in the preceding paragraphs, Defendants have engaged in, conspired to engage in, or aided and abetted the acts of extortion described more fully above.

93. By reason of Defendants' violation of 15 U.S.C. §2 and the overt acts taken in furtherance of the illegal conspiracies, Petrochem has been injured in its business and property. It has been foreclosed from obtaining contracts on which it would have earned a profit. In addition, its goodwill and business reputation have been seriously damages, impairing its ability to carry on business in the future.

THIRD CAUSE OF ACTION

94. Plaintiff repeats and realleges paragraphs 1-80 of the preliminary allegations, and paragraphs 82-88 of the first cause of action, and paragraphs 90-93 of the third cause of action inclusive, as if fully set forth herein.

BACKGROUND OF THE BIDS PROGRAM

95. By the Defendants' own description, the BIDS Program ("Bidder Information and Directory Service") is funded by money taken out of membership dues and transmitted to Defendants by employers pursuant to a dues check-off procedure. Originally funded by Defendant Local Unions 159 and 343, Defendant District Council 51 now provides the funding by grant to the program located in Concord, California. BIDS provides union contractors specific information where new and proposed construction jobs are located, what stage the proposed project is in, pertinent financial data, and how and where to direct bidding application. All the data that BIDS provides comes from a special computer tracking program which was designed specifically to generate this pertinent information for union contractors. BIDS information is mailed primarily to contractors within the District Council 51 jurisdiction, but is also sent to union contractors from outside the area when District Council 51 deems it necessary. At the same time, these "tracked" jobs and the resulting information is also provided to the business managers of all the Defendants Local Unions who, in turn, begin preliminary investigation of the permit stages, and if necessary, file preliminary permit objections. BIDS is used specifically to provide business development opportunities to union contractors. By defendants own admissions its funds are not used for job site employee organizing, administration of any local unions, or educational purposes. It is, in short, a sales program, funded by dues, funneled through District Council 51, and paid to the Council by union contractors payroll deductions.

96. Both the Tom Adams Program and BIDS is financed by union-signatory contractors who contribute

fifty cents per man-hour to District 51. These payments are not union dues within the meaning of 29 U.S.C. §186 because the funds are not spent on negotiations, collective bargaining, or union organizing of employees of non-signatory companies. The funds allocated to the Tom Adams Program are largely used to pay the fees of Adams & Broadwell and the funds allocated to the BIDS program is used to act as a marketing agents for signatory contractors.

97. The Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. §1962(c) makes it unlawful, inter alia, for any person employed or by associated with an enterprise engaged in interstate commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. Section 1961(1) defines racketeering activity to include any act which is indictable under title 29, United States Code, §186 (dealing with restrictions on payments and loans to labor organizations).

98. The Locals, Adams, and Hunter are all "persons" as defined by 18 U.S.C. §1961(3). District Council 51 is an "enterprise" that is engaged in, and the activities of which affect, interstate commerce, as defined by 18 U.S.C. §1961(4). In addition, all Defendants have associated in fact to form an "enterprise" within the meaning of §1961(4).

99. District 51 was originally organized for the purpose of engaging in a variety of activities as agreed upon by its constituent members. Those activities include, but are not limited to, coordination and implementation of the BIDS Program. The BIDS program is funded by employer payments, which are made to a union, and not within any exception to 29 U.S.C. §186. The associa-

tion-in-fact of all Defendants began in or after 1985. The association-in-fact continued after the 1988 formal organization of District Council 51. Since that time, all members of the association have shared the common purpose of maximizing, both through lawful and unlawful means, the use of union contractors in Northern California construction projects. The use of employer payments to the BIDS program, which is not a jointly administered separately maintained labor management cooperative trust, but functions to "sell" and promote union signatory contractors with potential customers, is a violation of 29 U.S.C. §186. The union has received more than two payments from employers and has funded on more than two occasions the BIDS project.

100. The Council is an "enterprise" that is engaged in, and the activities of which affect, interstate commerce, as defined by 18 U.S.C. §1961(4). Additionally, all Defendants, or alternatively, the Council and the Locals, have associated in fact to form an "enterprise" within the meaning of 18 U.S.C. §1961(4). Both enterprises have continued to function as ongoing and continuing organizations through the filing of this complaint.

101. The Locals, Adams, and Hunter are associated with the District Council 51 enterprise and have conducted or participated in the conduct of its affairs through a pattern of racketeering activity. Each Defendant has conducted or participated in the conduct of the association-in-fact enterprises's affairs through a pattern of racketeering activity. Such actions violate 18 U.S.C. §1962(c).

102. The past and continuing act of accepting employer payments for the BIDS program described above constitute a "pattern of racketeering activity" as defined in 18 U.S.C. §1961(5).

103. Defendants, and each of them have received BIDS money from proceeds paid by union-signatory contractors including, but not limited to ACS, Performance Contracting, Plant Insulation, and Rogers Insulation.

FOURTH CAUSE OF ACTION

104. Plaintiff repeats and realleges paragraphs 1-80 of the preliminary allegations, and paragraphs 83-88 of the first cause of action, paragraphs 90-93 of the second cause of cause of action, and paragraphs 93-103 of the third cause of action, inclusive, as if fully set forth herein.

105. The Racketeering and Corrupt Organizations Act, 18 U.S.C. §1962, sets out "prohibited activities" under the statute. 18 U.S.C. §1962(a) makes it unlawful for any person who has received income derived, directly or indirectly, from a pattern of racketeering activity to use or invest any part of such income or its proceeds in establishing or operating any enterprise that is engaged in, or the activities of which affect, interstate commerce.

106. The Locals and District Council 51 are "persons" as defined by 18 U.S.C. §1961(3). District Council 51 is an "enterprise" that is engaged in, and the activities of which affect, interstate commerce, within the meaning of 18 U.S.C. §1961(4).

107. Beginning in February 1986, and continuing thereon even through the current time, the Locals and District Council 51 have received income from this patterm of racketeering activity, in the form of assessments per man-hour paid by union contractors deducted from the pay of individual employees. Although initially it was only the locals who received these funds until Dis-

trict Council 51 was formed, after 1988, District Council 51 was a direct recipient of these funds. The Locals and District Council 51 have used and invested such income or its proceeds in the establishment and operation of District 51. Such conduct violates 18 U.S.C. §1962(a).

108. By reason of the Locals' and District 51's violation of 18 U.S.C. §1962(a), Petrochem has suffered injury to its business and property. In particular, Petrochem has been injured not only by Defendants' acts of establishing and implementing the BIDS program, but also by District Council 51's use of the racketeering proceeds from the BIDS program to continue implementing the "Tom Adams Program".

FIFTH CAUSE OF ACTION

109. Plaintiff repeats and realleges paragraphs 1-80 of the preliminary allegations, and paragraphs 82-88 of the first cause of action, paragraphs 90-93 of the second cause of action, paragraphs 95-103 of the third cause of action, and paragraphs 105-108 of the fourth cause of action, inclusive, as if fully set forth herein.

110. 18 U.S.C. § 1962(d) makes it unlawful for any person to conspire to violate 18 U.S.C. §1962(a) or 18 U.S.C. §1962(c).

111. Defendants knowingly, willfully, and unlawfully did conspire, agree and combine together with each other to commit the violations of 18 U.S.C. 1962(a) as described more fully above. In addition, Defendants knowingly, willfully and unlawfully did conspire, agree and combine together with each other to commit the violation of § 1962(c) described more fully above. These conspiracies are unlawful and violate 18 U.S.C. §1962(d).

JURY DEMAND

112. Plaintiffs hereby demands that this action be tried before a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgement as follows:

A. An award to Plaintiff of such damages as it shall prove at trial, trebled as mandated by 15 U.S.C. § 15 and 18 U.S.C. §1964(c);

B. An award to Plaintiff of interest on its damages at the highest rate allowed by law;

C. An award to Plaintiff of its costs of suit, including a reasonable attorneys fee;

D. an injunction against Defendants', and each of them, entering into agreements, express or implied, with project developers and owners, not employing craft workers within the construction industry, to cease doing business with Petrochem and other non-union contractors in exchange for withdrawal or not filing environmental and permit objections, but that nothing contained within such injunction shall in any way be construed to prohibit Defendants from filing otherwise legitimate compaints or exercising any other rights of petition or free speech to which they are entitled, and

D. An award of such other and further relief to which plaintiff may show itself justly entitled.

Dated: September 1, 1991

THIERMAN, COOK, BROWN & PRAGER

/s/ Mark R. Thierman
Mark R. Thierman
Carole E. Seliger
Attorneys for Plaintiff
Petrochem Insulation, Inc.

ces/3370/pld/ver2cmplnt/ces.ver3

APPENDIX F

[1]

A PRESENTATION OF THE
NORTHERN CALIFORNIA
NORTHERN NEVADA
PIPE TRADES

DISTRICT COUNCIL #51

GREG STEPHENS – San Jose:

I think people, their attitude was, well, it's out there, I don't know if it's a real threat yet. But it took its course. In five years it's really become a threat.

DAVID SCOTT – Sacramento:

To me it seems like they've taken over a majority of our work. You see a lot of jobs going on but there's just no work for the union guys.

BILL REYNOLDS – Oakland:

It's just that it wears on you. Your patience. Your home life. Everything changes because you're struggling to stay alive, basically, just to compete with the non-union.

BRIAN KENYON – Redding:

We had a college up here that would

[2]

have been a good job that went non-union. And you're just watching not only the big jobs but the

little ones hurt you just as much.

FLOYD PADGETT – Modesto:

Modesto's always been kind of a farm community, too. So it's always been kind of a non-union area in this area. You have a lot of trouble trying to keep the union going.

JAMES JONES – Oakland:

It's been a struggle. It's been a hard struggle because the non-union has really basically took over housing. It seems like the only thing we have left is commercial. But we're going to get housing back.

LUPE RAMIREZ – San Jose:

If housing goes, okay, I guess we're going to have to jump to commercial. But the thing is, commercial's going – sooner or later's going to go, too.

PAT BJERKE – Salinas:

I never thought about unemployment.

[3]

That was the one thing that I do remember. And, of course, now it's pretty much constantly on your mind. Job security and so forth.

JOHN HOGAN – San Mateo:

At the time we didn't figure that they were going to be any trouble. That they were only going to take a few ding-bat jobs, a few remodels. They weren't going to be competitive with us.

And now they've worked in to where they

are becoming more and more of an aspect in our crafts. Trades.

It doesn't look good. The future does not look good. And something has to be done to try to correct this problem. The answers are hard to find. It's going to be a difficult thing to correct, if it can be corrected.

But I think we should try.

NARRATOR:

In the last decade the United Association local unions in California, indeed *all* California constructions trades, have been under assault. Driven in part by the Reagan depression of the early 1980's, non-union contractors and

[4]

developers have flocked to the state in search of easy profits.

BILL RHOTEN — Business Manager, Local 447, Sacramento:

Now what we have is corporations that come into northern California, they might build a plant like this in Redding, and we can say in Sacramento, "Well, that's not our problem because it's in Redding."

But the truth is it is our problem because when they get done building their crews up in Redding then they move them right down to Sacramento. Or if they build them up in Sacramento, they move them right down to the Bay Area.

So it's a common problem more so than it ever was.

GARY SAUNDERS- Business Manager, Local 467, San Mateo:

If you're going to fight a battle, it's always easier to fight the battle somewhere else except in your home territory. And in our opinion anything we can do to turn around non-union construction to union construction in another area, benefits us in the long run. It keeps those

[5]

people from coming here.

ROBERT WARD – Business Manager, Local 246, Fresno:

Most of the non-union contractors in the past have started small and they usually start in a smaller area where it's easier to get work and the competition is not as great.

And by doing the work cheaper they can get the work and then they go from there. It's like a cancer.

BOB DUFFEY – Business Manager, Local 393, San Jose:

Any time that a large amount of work's being done non-union, anywhere within the geographical area of your state or your region, you're developing very strong financial non-union businesses. The stronger they get the more dangerous they become to us.

TOM HUNTER – Business Manager, District Council 51:

All the local unions in northern California and northern Nevada figured out that, look, what we have to do is – if we're serious about going after the non-union, then we have to get after the non-union in the area in which they

[6]

cover, and which basically for us is northern California and northern Nevada. And the only way we can do that is set up a council, hire organizers and so on, that can jump across jurisdictional lines and chase a contractor down.

DISTRICT COUNCIL 51
62, 159, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 471, 492, 503, 662, 669, 467, 228, 483.

NARRATOR:

After years as an unofficial association, in 1988 the northern California – northern Nevada pipe trades were chartered by the United Association as District Council 51.

Fourteen thousand U.A. members in 19 local unions currently contribute 15 cents for each hour they work to the Council to fight the non-union challenge in northern California.

TOM HUNTER – Business Manager, District Council 51:

But we have understood for a long, long time, in unions, what the people who put unions together have always understood, is that whatever happens to one of us is going to happen to another

[7]

of us. It may take a little bit of time but it will eventually happen to us.

NARRATOR:

For a century the principal expression of union solidarity, of union power, has been the picket line, a demonstration outside a non-union

construction site to shut it down until the contractor hired union journeymen.

But the old ways were not an option for District Council 51. The introduction of the two gate system in construction has made the picket line more a symbol of union weakness than union strength.

BOB LONG – Redding:

In the fifties and sixties when I first got in the trades, why, if one trade had a problem and they walked off the job for any reason or didn't get on the job, why, everybody else backed off and that was the way we could put pressure on people and we could control things a little bit better.

Now a days one trade gets a chance to get in, they just take it and go.

[8]

MARK NIEL – Modesto:

I've been on a picket before. We picketed a non-union plumbing shop here in town, oh, about four years ago, I guess. It didn't seem to affect them at all. Work went on.

RICHARD SMITHSON – Reno, Nevada:

Legally they can go with a two gate system. If you throw a picket on the front they can let a non-union company come in right on the back door and do the job in your place.

SILAS STOUT – Bakersfield:

I think the day of hitting people over the head to get them to understand your part of it

is gone. We've got to out talk them and out maneuver them.

TOM HUNTER – Business Manager, District Council 51:

Our deal has always been that if you're going to build, whatever it is you're going to build or whatever you're going to do, you're going to do it union or you're not goint to do it at all.

Years ago we were able to do that by using

[9]

picket lines and other – through the National Labor Relations Board. Through politics. We've sort of lost that.

So what we are now doing is, we are doing the same thing that we did in the past except we're using a different way of doing it.

BLUEPRINT FOR THE FUTURE
PIPELINE INVENTORY PROGRAM

NARRATOR:

The first challenge was information. What was being built where.

TOM REID – Environmental Consultant, District Council 51:

Often the business decisions by industry moving into California had already essentially ruled out union labor. And California is a growth state. And over the past 20 years there's been a tremendous change in the profile of the people

doing business in the state. And without being able to keep track of new people, new players coming in, opportunities for union jobs were being missed.

[10]

And what PIPELINE does is it presents the information in a screen which is divided by different colors as a way of categorizing the information.

Well, the blue screen at the top is the basic information about the project. How big it is. Where it is. The applicant's name.

It's possible to take a look at the big picture. Where, in all of the northern California and northern Nevada territory are there energy projects. And what kinds of patterns are evolving.

So one of the things that can happen is that we can punch up a map of energy projects. I've asked Mark to display the projects that are in PIPELINE right now. All of the purple labels there, are individual energy projects.

But we can zoom in on any given part of it. For example, northern California. And we can see energy projects. These are mostly cogeneration projects associated with the forest products industry.

We can zoom in further and resolve projects – here are three in Shasta.

PIPELINE doesn't create something

[11]

unique. It doesn't create understanding. The business managers have the understanding of their

members and their market place. All this is meant to do is to give them more accurate information a little bit faster so that they can do their traditional job more efficiently.

BLUEPRINT FOR THE FUTURE
BIDS PROGRAM

NARRATOR:

Information. In part the decline in union residential and commercial work could be traced to a lack of information. Many union contractors simply did not know what jobs were open to bid and what jobs were coming up.

If the non-union assault was to be turned back, union contractors had to bid and win more work for union members.

MICHAEL BEAVERS – Business Manager, Local 343, Vallejo:

We were losing contractors. We didn't have enough contractors to bid the work that was being bid in the area. So the only way we could figure to get more contractors into the area was

[12]

to bring them from the outside, from the surrounding areas, and bring them into our area to bid work. And the only way they were going to do that is if they knew what was going on in this area.

NARRATOR:

To respond to this need, District Council 51 has funded a program developed

initially by Local 159 in Martinez and Local 343 in Vallejo.

The program is called BIDS. Short for Bidder Information and Directory Service.

GAIL DARKE – Director BIDS, Concord, California:

This office collects construction information from, I don't know, probably up to 50 different sources, compiles it into a computer data base and mails it out to subcontractors and local unions for their use in bidding work.

It started with a grant from District Council 51. They provided us a grant and allowed us to start in a pilot situation with Contra Costa and Napa and Salono Counties. And has developed to this point now that we are covering 13

[13]

counties.

Once the Council started us off, other local unions wanted to participate, and they do by covering costs to do the work in their areas.

GEORGE FOSTER – Business Manager, Local 350, Reno, Nevada:

Local 159 developed it, then Local 343 joined in with 159. We saw what they were doing. It looked like it would have a lot of merit for our area. We obtained a grant from the Council to start that program. We've had it in effect for about two years now. And because of the program we're getting work that we probably wouldn't have got any other way because we wouldn't have known of these different jobs that are going out for bid in our area.

GAIL DARKE – Director BIDS, Concord, California:

The concept is more jobs for union members. And that's always been our purpose and that is what we're striving for.

From what I understand of what they're telling me, they're bidding more work, they're being awarded more work, and in turn they're

[14]

hiring more members out of the hall and that's what we're designd to do.

So that is how we gauge our success.

EDWARD KELLY ANSCHUTZ – Business Manager, Local 159, Martinez:

It has proved invaluable just recently because the government has required a Davis-Bacon wage survey. And with this archives we have a pretty good handle and a comprehensive list of the work that is going on in our jurisdiction and the contractors that were awarded that work. And we're way ahead of the other crafts that do not have this information or do not subscribe or participate in the bids.

PAUL VERNOCY – Marketing Consultant, District Council 51:

Yeah, Doug, this is Paul Vernocy with District Council 51 –

NARRATOR:

To facilitate the BIDS program, District Council 51 has hired three organizers and a marketing consultant to reach out to both union

[15]

and non-union contractors.

PAUL VERNOCY – Marketing Consultant, District Council 51:

Our basic job is to contact the development community to reaffirm and to get our union contractors back in a position to be able to bid their work. This is done through personal contacts with the development community and also going to the job site and working with the superintendents.

The job actually entails working with residential contractors that probably haven't really done residential work for quite a few years, so it's like a re-education of how to get back in the market place.

The other side of the coin is we're organizing non-union shops and making them union shops in the effort of acquiring more of the market place.

NARRATOR:

The work of the BIDS program, the organizers and marketing consultant, is supported by a print ad campaign targeted at developers and

[16]

owners.

JOE WINSTEAD – Business Manager, Local 492, Stockton:

Today with the agreements in the northern California council and organizers we see it coming back.

As of yesterday I was talking to one single contractor who employs 42 plumbers and he is very interested in negotiating an agreement with us.

NARRATOR:

Since the founding of the United Association the key to the union's success in fighting the non-union has rested on the skill and training of its members.

MARVIN J. BOEDE - President, United Association

What we do and how we approach this problem is to continue to do what we do best. And what we do best is to get the best raw material possible and give it the finest training possible.

The United Association training program is commonly recognized as the finest apprenticeship training program in the country.

[17]

NARRATOR:

But as important as the U.A.'s five year apprenticeship and continuing journeyman training programs are to the future, training alone isn't enough to beat today's non-union assault.

For non-union contractors and their multi-national corporate clients think they can eliminate the need for U.A. skills by cutting corners on environmental protection and safety. stealing from the community's future in the same way they do from there non-union workers.

TOM ADAMS – Environmental Attorney, District Council 51:

The unions had for a long time been participating in the political process and supporting construction projects, but after the unions had expended their political effort and helped the developer out, the developers were going non-union. It didn't seem right and it didn't seem fair and so we designed a way for the unions to participate in the permit process that was more constructive and would yield fair results for labor's political efforts.

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BLUEPRINT FOR THE FUTURE
JOBS & COMMUNITY PROTECTION PROGRAMS

TOM ADAMS – Environmental Attorney, District Council 51

When we become aware of a project that is in the permit process, we examine it to determine whether or not there are environmental or planning or other regulatory problems with the project. And if there are meritorious objections that can be raised to a non-union project, we raise them.

And a lot of times in this process, we, by virtue of the objections we raise, we get concessions from the developer, or the governmental agency imposes conditions on the project which make the project better for the community. And also a lot of times we convince the developer that, you know, he should enter into an agreement with the unions to make the project a union project.

[19]

JOB & COMMUNITY PROTECTION PROGRAM

NARRATOR:

The first major test of the job and community protection program, often called the TOM ADAMS PROGRAM for short, occurred near Redding California, in the fall of 1986.

Allied Signal Corporation, a multi-national energy developer, sought to build a 50 negawatt biomass power plant in Shasta County using non-union labor. (Cottonwood Power Plant)

District Council 51 helped the Redding Local intervene in the environmental permit process of the plant.

JOHN WILSON – Redding:

We should be grateful for a project like Signal, and if it was a quality project we would be grateful for it. If they didn't interfere with our lifestyle that we all enjoy and we all stay here for, we would be happy with it.

But I don't think that they came up to those standards.

[20]

TOM ADAMS – Environmental Attorney, District Council 51:

If you want an example –

NARRATOR:

The union lawyers and environmental experts fought a war with Allied Signal through a series of local and state hearings, making the case that a developer who attempts to cheat workers by building non-union will also try to cheat the community by doing as little as possible to protect the environment.

In the end the Allied Signal plant was built non-union, except for the Unit One union built installation of pollution controls.

TOM JOHNSON – Business Manager, Local 662, Redding:

We were able to make the company that we were fighting install all the pollution control units that we had asked for and they did that. In fact, they did it with all union people.

TOM ADAMS – Environmental Attorney, District Council 51

If you look at it as a war we lose some big battles but we ultimately won the war.

[21]

TOM HUNTER- Business Manager, District Council 51:

What the Redding fight did for us was that it showed these other industrial users that we were not going to quit. That – because they must have known, as we knew when we were half way through that fight, we had a loser.

Our deal then was to keep on fighting and to make everybody understand that that was the deal with us. That there was no – that there was simply no end to it. We would just keep on fighting.

NARRATOR:

Almost immediately the strength shown by District Council 51 in the Allied Signal fight produced results on another cogeneration project in Shasta County. General Electric had been hired to build a 27 megawatt facility at Burney. They planned to build it using G.E.'s non-union arm, QPI.

TOM JOHNSON – Business Manager, Local 662, Redding:

I called up the owner and told him that I was just going to let him – I'm letting him in

[22]

on something. And I let him know that District Council 51 was looking at doing a major job action against QPI.

And he asked me if I could buy him some time. And I said, "Well, I don't know. I'll make a call and see what I can do."

And so we waited a while. I called him back and told him I bought him a week if he thought he might be able – you know – I didn't know what he was planning but if he could do something, you know, we could talk.

Well, in that week he turned the project around, made it all union.

NARRATOR:

The Burney Cogen. One hundred percent union. Two hundred thirty thousand man hours of work.

The Clear Creek cogen south of Redding. One hundred percent union. One hundred fifty thousand hours of union work.

TOM JOHNSON – Business Manager, Local 662, Redding:

They kicked the non-union off, put us on it, and we picked up the pace and there wasn't a

[23]

day missed.

The company sent them a plaque about a job well done. They come in under budget and ahead of schedule and we started four months late.

NARRATOR:

The Woodland Cogen north of Sacramento. One hundred percent union. Fifty thousand man hours for U.A. members.

BILL RHOTEN – Business Manager, Local 447, Sacramento:

This is the first project in our jurisdiction that was turned around using this process, the permit process. We financed it with help from the Northern California Pipe Trades Council.

I can tell you if we didn't have the Northern California Pipe Trades Council program in place when this plant came to town it would, in fact, be built non-union.

NARRATOR:

A 400 million dollar NEC plant expansion in Roseville. One hundred percent union. Over 400,000 man hours for U.A. members.

[24]

BILL RHOTEN – Business Manager, Local 447, Sacramento:

When we went to take on NEC – when you sit down in a room full of other building trades managers, instead of being pessimistic about it, they can finally sit in a room and say, "By God, let's just take them on. Let's make them move the plant to Texas. We're not going to have it in Sacramento, 50 percent union and 50 percent non-union."

And they see a vehicle to turn the jobs around.

NARRATOR:

Bakersfield Chevron Cogen. One hundred percent union. Fifty thousand man hours for U.A. members.

JOHN MICHELSON – Business Manager, Local 460, Bakersfield:

We've had successful stories in Bakersfield that is astounding. We started out – the first project that we took on we had completely lost all residential plumbing. Chevron, the land development, started development here in town. We

[25]

become an intervenor in the process. And as a

result we have plumbed all of the houses with about 3,000 units still to go on line.

CHINA LAKE
GEO-THERMAL PROJECT

NARRATOR:

China Lake geo-thermal project. One hundred percent union. Over a million man hours for U.A. members.

JOHN MICHELSON – Business Manager, Local 460, Bakersfield:

They had 15 hundred non-union workers on the job. They were in process. They had already completed two plants.

As we went through the permitting process, looked at the environmental issues, looked at all of the political issues, they removed the 15 hundred non-union workers from the job in the middle of it and they have replaced them with 500 unions workers and the job is proceeding ahead of schedule at this time.

We just got through successfully

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building six cogens, two on each site, for a company called PS&E. As a result, they're building six more. They came to the building trades because of the quality work that we give them. And those are now starting and they're all union.

ROBERT WARD – Business Manager, Local 246, Fresno:

Well, just recently we got a project agreement on a GWF cogeneration plant in Hanford California. Originally that project would have been done non-union. But through Tom Adams' office and working through the environmental issues we were able to turn that around and get it an all union project.

MATT WALTERS – Business Manager, Local 290, Oregon:

We've won many, many victories, but the one that was probably publicized the most is the one that's on that wall right there. When Brown & Root was here 18 months ago we put a concerted effort. It was supported very strongly by this membership and the District Council, and Brown & Root no longer is in this jurisdiction. And we don't think that they'll be back.

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We now have that work and this year we will have 600 members working on it.

DOYLE WILLIAMS – Business Manager, Local 342, Concord:

I think District Council 51's future's just starting, because – especially if we can gather the rest of the building trades behind us. Because there's no question about it, District Council 51 has brought about the five cogeneration plants in our area lone, just by fighting that one in Redding.

And I feel that if we can get the momentum together with the other crafts – I'm not talking about the U.A. locals, now, I'm

talking about the other building trades crafts – bring them together in a cohesive front, then we can really make a count of ourselves.

NARRATOR:

In September, 1989, there were 131 energy projects in Northern California being tracked by the PIPELINE system, from initial planning to construction. These projects represent almost six million man house of work for U.A. members.

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Before District Council 51, the vast majority would have been built non-union or partially union. Today the reverse is true.

WADHAM ENERGY PROJECT
SMITH RIVER BIOMAS
CAL AG BIO
MENDOTA BIOMASS POWER
SUNFLOWER VALLEY ENERGY
DELANO ENERGY PROJECT
CAPCO-MADERA POWER PROJECT
CAPCO II
VALLEY POWER ASSOCIATION
HARWOOD COGENERATION FACILITY
WESTERN FOREST PRODUCTS BIOMASS POWER PLANT
SOLEDAD ECOLOGY POWER I
TEDCO BIOMASS POWER PLANT
CROCKETT COGEN
CHEVRON RICHMOND COGENERATION
GWF I

GWF 2
AGRICO COGEN
CALIF. AGRI. POWER CORP. COGEN
DEV: WESTERN POWER SYSTEMS

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SIERRA PACIFIC INDUSTRIES COGEN
SIMPSON PAPER CO. COGEN POWER PLANT
RIO BRAVO POSO
RIO BRAVO JASMIN COGEN
U.S. BORAX COGEN
SOUTH BELRIDGE COGEN
MIDWAY-SUNSET COGEN
CATERPILLAR CAPITOL COGEN
UNIVERSITY ENERGY COGEN
COMBINED ENERGY COGEN
MOUNT POSEN COGEN
KERN FRONT COGEN
SANTA FE ENERGY COGEN
HIGH SIERRA COGEN
KERN ISLAND COGEN
J.R. WOOD FRUIT COGEN
AMERICAN COGEN 1
MARPORT 1
MARPORT 2
AGNEWS COGEN FACILITY
STATION T
CALIF. BIORESOURCES II
SIERRA PACIFIC INDUSTRIES COGEN
SIERRA PACIFIC MILL COGEN
SAN JOAQUIN COGEN

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CITY OF TRACEY COGEN
CRABTREE, KENNETH G.

BASIC AMERICAN FOODS COGEN
O'BRIEN ENERGY SYSTEMS COGEN
GREENLEAF POWER 1
GREENLEAF POWER 2
NORCAL FOODS COGEN
NAVY 1, UNITS II & III
BLM I, BLM II
NAVY II, UNIT I
WEST FORD FLAT PLANT 19
SAI GEOTHERMAL NO. 3
PG&E NO. 21
BEAR CANYON PHASE II
HONEYLAKE HYBRID POWER PLANT
MAMMOTH/CHANCE PROJECT
SAI GEOTHERMAL 1
SAI GEOTHERMAL 2
MOBIL SAN ARDO COGEN
TRI-CITIES SOLID WASTE
BARA SITE 3
BARA SITE 1
BAY AREA RESOURCE RECOVERY FACILITY
MODESTO TIRE TO ENERGY FACILITY

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TOM ADAMS – Environmental Attorney, District Council 51:

Some of the biggest, you know, corporations in the United States, oil companies, large manufacturing companies, have all had to come to terms with us in one way or another, and I think everybody takes us really seriously.

NARRATOR:

Even the largest corporation in

California, even Chevron, has begun to see the light because of another fight District Council 51 undertook.

TOM HUNTER – Business Manager, District Council 51:

The reason – when we started to meet with Chevron it was over the cogeneration plant. But Chevron has learned since then, of course, because -- not so much because of the fight with Signal Energy but because of U.S.X. Pasco that – the same lesson – that we simply will not stop.

And so Chevron is now – in my opinion, anyway, is going to sign an agreement with us covering their burn-out (sic) which is 400 million

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dollars, the Cracker Unit, which is one point four billion dollars.

So Chevron is now dealing with us.

BLUEPRINT FOR THE FUTURE
PREVAILING WAGE

NARRATOR:

What the non-union couldn't win in a reasonable and fair bid process they tried to take away through the political process with another union's help.

TOM HUNTER – Business Manager, District Council 51:

And the attack that we are under

basically on prevailing wages is not from the non-union, it's from other unions. These other unions trying to steal our work.

NARRATOR:

The Council's outlined jurisdictions were targeted first. In 1987 a move was made to lower the prevailing wage in Humboldt County a day before bids were opened for construction of a

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4,000 bed maximum security prison in Pelican Bay. (Crescent, Ca.)

GARY HABERMAN – Business Manager, Local 471, Eureka, California:

A gal on staff for the Attorney General was Kathy VanAiken (sic) and she had made that determination.

I says, "Well, that's wrong. I'm going to see my attorneys."

And she says, "Go ahead and see your attorneys." She says, "The bids are open tomorrow at 4:00 o'clock and this is Monday at 11:00 o'clock. There's nothing you can do in one day's time."

I said, "Well, I'll see about that."

NARRATOR:

In less than 24 hours District Council 51's lawyers were able to reverse the state's prevailing wage decision. The Pelican Bay state prison, except for one small phase, was built by District Council 51 members.

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TOM ADAMS – Environmental Attorney, District Council 51:

When we started doing this people said that it was ridiculous. In this day and age you're never going to get anybody to expand the coverage of prevailing wages. I mean, everybody thought the best we're going to be able to do is to prevent prevailing wages from being cut back.

And many cities or counties have redevelopment areas and have redevelopment agencies, and a lot of the projects that occur in those agencies come about because they're stimulated by public investment.

And so we have gone to redevelopment agencies and made our pitch to them about the fairness of putting prevailing wage requirements on what would otherwise be seen as private projects in redevelopment agencies. And we have been successful.

CHUCK FUGEL – Business Manager, Local 444, San Leandro:

We're talking in the neighborhood of billions of dollars worth of work is now under the prevailing wage ordinances and we have been fairly successful, in fact, exceptionally successful in

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seeing the work that is now in progress, that is going to be bid, is going union.

GARY SAUNDERS – Business Manager, Local 467, San Mateo:

We now have eight cities that have a prevailing wage condition within their

redevelopment areas. We have two cities that have a city wide prevailing wage ordinance with certain thresholds for size of construction and dollar volume.

It's been a great program for the building trades, plus it promotes local construction contractors, local workers, and puts all the money that we earn back into the businesses and the communities in which we live.

PRESTON OLIVER – Business Manager, Local 437, Modesto:

The Red Lion Hotel is – it's being done a hundred percent union at this time. We became real politically involved with the city council members and told them that of all the things needed on that job was to maintain the prevailing wages.

Another waste energy job was one of our biggest victories against Brown & Root. We

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went to the – to our legislators up in Sacramento and showed to them that it just didn't make good sense to use Brown & Root on that job and told them the reasons why. And become real involved with the committees that were responsible for awarding the moneys on that job and just turned it around. (Stanislaus Resource Recovery Facility)

If we're not involved in politics we're going to be out. It's the only game in town right now. If you're not politically involved and environmental involved, then we'll due on the vine.

BUD WEATHERWAX – Bakersfield:

It seems that if we're not politically involved, other people that are are just getting way ahead of us. And we have to stay involved to just keep up with what we have. They'll legislate us out of business if they get a chance.

PHIL PHARISS – Fresno:

If we wasn't involved in politics – there's a lot of politicians right now that are trying to bust the unions. And if we don't get

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involved they'll be successful. There'll be a lot of people out of jobs.

LLOYD SMITH – Redding:

You've got to elect someone that's going to represent you as a working person. That's it. Whether it's a state level or county or city or whatever.

BOB HOWARD – Business Manager, Local 503, Salinas:

The Council really helps on the political end of this thing. The things that we can't get done sometimes, especially on the state level, the national level even.

TOM HUNTER – Business Manager, District Council 51:

What we have turned around is the – we have turned around the idea in the politician's mind that the non-union was on a roll. They see us, the pipe trades, as being on a roll, turning things backwards, and so they are with us.

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BLUEPRINT FOR THE FUTURE
PLBG & MECH CODES
IAPMO

NARRATOR:

Standards. The maintenance of the highest possible standards of craft, of community and environmental protection have been critical to the success of the United Association.

District Council 51 helps fight for and preserve those standards through IAPMO, the International Association of Plumbing and Mechanical Officials, an organization that helps set the code standards in a dozen states.

The Council attends IAPMO meetings to work with state and local inspectors on the elimination of unsafe materials and practices often utilized by non-union contractors.

In addition, the Council has fought for the creation of state certification programs in specific pipe trade skills, including plumbing, welding, high purity pipine and orbital welding, medical gas installation.

These programs have undermined the ability of non-union contractors to compete against U.A. mechanics.

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JOHN MICHELSON – Business Manager, Local 460, Bakersfield:

Memorial Hospital was totally non-union

for the plumbing and piping and the medical gas. It was almost complete. They were working on the fifth story.

FREEMAN LITTLE – State Medical Gas Inspector:

That oxygen system was not reamed. It was not – they did not use medical dry nitrogen on the system when they were brazing it up. The people that were brazing it were not qualified. In fact, most of these young kids were making anywhere from $4.50 an hour up to seven fifty an hour and they called themselves experts, which I know that they're not an expert.

So I began to write memos on this particular hospital warning them that there were going to be serious problems if they didn't start following my instructions on these memos.

They just totally ignored me.

JOHN MICHELSON – Business Manager, local 460, Bakersfield:

At this time Tom Adams' office was

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contacted. They acted on our behalf through the inspectors. The inspectors finally, after they had had enough letter writing, condemned the hospital. They shut it down for five months They de-sheetrocked. Took out all the medical gas. And then it was reinstalled by U.A. plumbers.

The second phase that was bid on that hospital as a result of us getting involved went totally union.

NARRATOR:

Non-union construction threatens the health and welfare of the community in other ways. Unscrupulous scab contractors can cheat working people through shoddy construction of their homes.

DAN McEVILLY:

They come in. They make their money. They hire somebody from out of town. You can't get warranty work done. They come in. They do this work. They get their money. And then they abdicate. They take off like scared rabbits. Disconnect their phones. The people aren't able to get them.

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NARRATOR:

Dan McEvilly, a retired plumbing inspector, helps homeowners like these in Contra Costa County identify and secure damages for code violating non-union work.

The program is supported in part by grants from District Council 51 and Local 343 of Vallejo and Local 159 of Martinez, who help homeowners secure legal counsel and identify expert witnesses to testify in their court actions.

DAN McEVILLY:

Our company was hired by Local 393 approximately two years ago. We've made the inspection as I stated on this building for local 393. We've done 40 or 50 other inspections out here and found various code violations.

The developer for this particular

project was a lady and I believe she identified herself as a vice-president. (The Redwoods Garden Apts., Phone 295-8700)

And she was very upset because she said it was going to cost her in the neighborhood of $40,000 to make the corrections. And I advised

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her that these corrections were necessary to protect the health and safety of the people that were living in these apartments.

EDWARD KELLY ANSCHUTZ – Business Manager, Local 159, Martinez:

In many cases the developer's general contractors, they've had just about all they want out of this shoddy workmanship, and on many projects our signatory employers have taken over from the non-union just because of that.

One fellow said – and I kind of like this – – he said, "You know, you guys cost more but you're cheaper."

And in the long run that's absolutely correct.

MICHAEL BEAVERS – Business Manager, Local 343, Vallejo:

Now we're using Dan as a marketing tool for our contractors. Our contractors can now say to the cities or developers, "Not only do we depend upon the city or the county to inspect our work, we've got our own inspection program that this man comes out and inspects our workers and tells us what our workers are doing wrong and

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fixes the problem before the developer has to get involved with complaints."

So that's a marketing tool that we use Dan for now over here.

RON CAMERON – Organizer, District Council 51:

The results have been tremendous. In a very short period of time where the business plan has been put into effect we've seen a tremendous amount of activity by U.A. craftsmen where there was prior – prior to that there was absolutely no activity.

For example, in the Modesto-Stockton area we had zero contractors, we had zero houses that we were doing by U.A. craftsmen. In a very short period of time we now have over 4,000 houses under contract. We have nine or ten contractors now in the area that we have signed up, organized, organized their workers.

We've been able to take 40 or 50 workers from the non-union – keep people from the non-union shops, put them to work for our employers. In the Bakersfield area a similar situation was there in a seven week period of time. We now have 12 contractors. We've taken 45

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individuals from the non-union and put them to work for our contractors.

We have been able to sign up a contractor with 20 workers in it in Tulare, more or less a breed haven in the lower Central Valley area. We just got him signed on. He's

very excited about the business plan and the types of things that we can do for him as a labor organization.

We've seen the market place increase in Vallejo where the business plan was originally fully adopted. We've gone from 14 percent of the market share to over 60 percent of the market share. And there's a tremendous amount of excitement. There's a tremendous amount of team work cooperation going on now between the contractors, between the union workers, between the development communities. We're all in this thing together and we're restoring the profitability that we once enjoyed ten years ago.

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BLUEPRINT FOR THE FUTURE
COMMUNICATION PROGRAMS

NARRATOR:

Communications. The community needed to be educated about th benefits of building with union contractors employing U.A. members.

BOB DUFFEY – Business Manager, Local 393, San Jose:

We find that we're operating in a vacuum. Over the years there was no attempt to tell the community at large or the end-user what the necessary skills that we had to develop what

they needed to develop the community and to develop the project for the end-user.

TRUST

NARRATOR:
Trust.

CY HOTOVEC – Construction Manager, Citations Builders:
Home buyers can't see the pipes behind these walls. But they expect quality workmanship.

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NARRATOR:
To meet this need, Local 393 of San Jose has produced a series of television and radio spots to tell the public about union quality.

SECOND NARRATOR:
Quality you can trust. Because it's union pipe trades work.

UNIDENTIFIED SINGERS:
America looks best when we say union yes.

BOB DUFFEY – Business Manager, Local 393, San Jose:
Going to television we told the general public and our target audience, which is in this area the electronic industry, the public works industry and the hospitals, and the housing industry, what we were doing, why we were

necessary and why we were the type of person they needed for their operation.

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CERTIFIED

NARRATOR:
Certified.

LINDA MORSE, M.D. – Chief, Division of Occupational Medicine and Employee Health Service:
A reliable supply of oxygen could be a matter of life and death in a hospital. The medical gaslines piping installation must be done by certified pipe trades workers.

NARRATOR:
Union pipe trades work. Quality that is certified.

UNIDENTIFIED SINGERS:
America looks best when we say union yes.

NARRATOR:
There is a new spirit in District Council 51. One that can be seen at the Council's softball tournaments sponsored by Local 492 in Stockton.

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Today , these U.A. journeymen, through their support of District Council 51, are turning back the non-union assault and contributing to their community's economic and physical health, while creating job security for themselves and their facilies.

It is a record to be proud of. It is a blueprint for the future.

BOB DUFFEY – Business Manager, Local 393, San Jose:

The brightest light in this operation is the number of local unions that are getting involved and going forward with programs. No longer do you find people sitting aside ringing their hands saying, "There is no hope."

The programs of Council 51, the individual local unions, Council 16, and the state pipe trades are putting forth are the types of things that are going to make it possible for us to eventually win. And win means the majority of the work performed in your area is union, not just the majority of your members working.

ROBERT WARD – Business Manager, Local 246, Fresno:

There is no room for us to say that

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we're going to reach a certain plateau and that we can kick back and relax again. Because we saw what happened to us in the past when we did that. And I think there will always be room for District Council 51 and a need for District Council 51.

JOE WINSTEAD – Business Manager, Local 492, Stockton:

We should definitely move forward. It'll never stop. We must continue to deal today as big business. And move forward. And stay political. And we'll survive. More than survive. We'll have jobs for our members.

JOHN MICHELSON – Business Manager, Local 460, Bakersfield:

We've got to go forward. If it costs another 15 cents, let's pay it. That 15 cents generated almost a half million man hours for our local alone in the last 18 months.

GARY HABERMAN – Business Manager, Local 471, Eureka, California:

All you see – you watch 20/20, Sixty Minutes, and they're showing you what's wrong but they're not really doing anything about it. 51 –

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– District Council 51 is doing something about it. The bidding program we have, the market recovery programs we have, organizing campaigns we have.

TOM JOHNSON – Business Manager, Local 662, Redding:

This gives us a little more hope that we might be able to turn some of this stuff around and also inform the public that – you know, we're not the enemy. We're not the bad guy out there. We're the one that's looking out for them. They sometimes forget that.

UNIDENTIFIED SPEAKER:

There was a time when winter rolled around we were out of work, bills got behind and you played catch-up come summertime. But he took a stance and decided to get involved. And that's what everybody needs to do.

If everybody was to get involved and work together there wouldn't be these lapses of unemployment. This non-union problem that we have. It's involvement that's going to make the difference.

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MICHAEL BEAVERS – Business Manager, Local 343, Vallejo:

It's absolutely critical. That is the life support system for the United Association of California is District Council 51.

Look at what we have done with 15 cents an hour. Look at the man hours that have been turned around with 15 cents an hour. Imagine what we could do if we had a dollar. We'd own the state.

In five years non-union pipe workers would be put on the endangered species list.

BOB DUFFEY – Business Manager Local 393, San Jose:

The fact that there is a single voice speaking for the United Association in northern California through Council 51, talking to developers, to end-users, to Sacramento, is a great advantage to us.

TOM HUNTER – Business Manager, District Council 51:

If we put all the programs that we have

into place, everywhere in our jurisdiction, and not one program over there working and another one's working over here, but all the programs working everywhere, if we do that and keep that

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there, that is it. In four years we will be back we will be doing 90 percent of the residential work and we'll be doing 90 percent of the commercial and basically – and the industrial work we should basically be doing all again.

See, our deal is you have to fight. If we don't fight, if we're not fighting, we can't retain an effort.

* * *

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CAMERA
Christopher Bedford

* * *

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* * *

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APPENDIX G

PARTICIPATION IN THE PERMIT PROCESS

1987

Tom Hunter
L.A. District Council 51

Ray Foreman
L.A. District Council 16

INTRODUCTION

Construction unions have participated in the permit process for many years in California. Traditionally we have supported development projects in the belief that support would translate into jobs for our members. Unfortunately, that is no longer true. We have all seen numerous projects approved with the political help of construction unions, only to find the construction jobs going to non-union workers from outside the local area. In many instances these workers migrate long distances from other states.

Additionally, we have seen irresponsible companies build projects which have caused more pollution than should be permitted. We are now threatened with construction moratoriums in many counties in California

because of failure to implement the Clean Air Act. Many communities have imposed construction moratoriums because of lack of sewage treatment capacity as required by the Clean Water Act. In other communities moratoriums and growth control measures have been imposed because of other environmental problems. The burden of these moratoriums falls on the construction worker.

It is time to take a new approach. We can no longer support every construction project which applies for a permit only to find big companies giving the jobs to non-union workers and also causing so much pollution or other environmental problems that a construction moratorium deprives us of future jobs as well. It is a double penalty we can no longer afford to pay.

As a result, we have taken our case to our elected and appointed officials in the permit process. Most officials have traditionally looked at whether a new project was going to create jobs; but they have not examined whether the local community will really get the economic benefits of those jobs. We have sought a more detailed review of these issues in the permit process so that public officials will know and understand the true economic, social, and environmental impacts of a project under review.

Time and again we have seen that the corporate desire to cut costs know no real boundaries. Irresponsible corporations will seek to cut the costs of labor and the costs of environmental protection alike. It should be no surprise that the same companies who are irresponsible on labor issues are also attempting to evade their responsibilities to the environment.

Our participation in the permit process has the broad goal of advocating regulatory action which will force construction companies to pay their employees a living

wage, including health and other benefits, and to meet their responsibilities to the community and the environment. We believe that enforcing corporate responsibility through the permit process will lead to fair treatment of workers as well as better protection for the environment. It is our hope that in this effort we can obtain new friends and allies for the labor movement. The common fight for all of us is against the irresponsible corporation.

This report summarizes most of the key cases in which some results, good or bad, were achieved in 1987. As it shows our efforts have had a real benefit to workers because some corporations have responded positively. Assuming that construction wages are about 25% of total construction costs, various projects discussed in this report are expected to pay union workers a total of about $300 Million in wages when these projects are ultimately constructed. It is fair to say that these wages would not be paid except for our efforts. Prevailing wages policies and conditions have been imposed on numerous additional projects.

The environment has also benefited. Tens of millions of dollars of pollution control equipment have been required. Irresponsible projects have been stopped altogether. Other projects have been reduced in density and redesigned to protect the environment.

As can be seen from reading this report, everything that we try is not a success. There are also numerous projects which are not discussed here where we investigated a proposed development project and decided not to get involved with it. Additionally, where there has been success, it has always been due solely to our efforts. Other members of the Building Trades have also worked hard and helped achieve good results. However, it can be

fairly said that we have played a significant role in achieving the successes that are discussed.

These successes do not come without a price. The efforts of our attorneys and environmental consultants are expensive; but you cannot get results like these without using good people. Some of these fights are short, but some are long. Experience has taught us that we cannot flinch from a protracted fight. In the Signal case, for example, it was only because we pursued every avenue legally available to us that we were able to achieve a successful outcome. We sustained defeats along the way, such as in the local Superior Court and in the Energy Commission, but because we persisted, we ultimately won.

1987 has been a year of hard fights against some of the biggest corporations of the world. This report is a summary of the key struggles of the year. Though the record is not a perfect record, it is a record of which we all can be justly proud.

SIGNAL ENERGY: SHASTA COUNTY

This project consists of a 49.9 megawatt woodburning power plant located near Anderson in Shasta County. Signal rejected a project agreement for the plant, and reportedly claimed that use of union labor would cost an additional $6,000,000. The County Planning Commission originally approved a negative declaration and use permit for the project. District Council 51 appealed to the Board of Supervisors who required preparation of an EIR. After the EIR was prepared, the Board approved the project despite our opposition and that of a significant part of the local community. The main problem with the plant was that its air emissions were so great

that this single facility might have brought the entire air basin into non-attainment. Non-attainment status means both that the air is not healthy to breathe and that a construction moratorium could be imposed by EPA.

We filed a lawsuit challenging the Board approval, appealed issuance of the air permit to the Environmental Protection Agency in Washington and filed a complaint with the Energy Commission alleging that the project had a generating capacity over 50 megawatts and was therefore subject to Energy Commission jurisdiction. The local Superior Court rejected our position, but we appealed and the appeal is still pending.

The Committee of the Energy Commission assigned to hear our complaint on generating capacity ruled, after twelve full days of hearings, that the plant's capacity was under 50 megawatts because Signal had no "intent" to operate in excess of that level. We believe that we proved that the physical capacity of the plant was in excess of 50 MW, and that the Committee's decision to base its ruling on operator intent was not in accordance with state law. Nevertheless, we were unable to persuade the Committee and elected to dismiss our complaint.

However, the EPA appeal resulted in the EPA filing suit against Signal for violation of the Clean Air Act. Signal finally agreed to enter settlement discussions; and the dispute has now been resolved. Signal has agreed to retrofit the nearly completed facility to install the same pollution control equipment we had originally advocated in permit hearings before the County. Under the settlement agreement, emissions from Signal's plant for particulate matter will be reduced by 40% and the emissions of NOx will be reduced by 25%. Hopefully, these emissions reductions will preserve the air quality in Shasta so that further growth can occur.

In addition, Signal entered into a consent decree with the EPA and agreed to pay a penalty of $100,000 for proceeding with construction in violation of the Clean Air Act. The modifications to the air emissions control equipment are extensive and could cost as much as $6,000,000.

WHEELABARATOR ENERGY - DELANO

In a new biomass power plant project in Delano, Signal (now Wheelabarator Energy) is now including the air quality controls required by the Clean Air Act, and the contractors bidding on the project are discussing project agreements with the Building Trades. This is an estimated $40 - 50 Million project.

SAN MIGUEL PROJECT: SAN LUIS OBISPO COUNTY

This project consists of construction of an on-shore oil processing facility and a pipeline to an off-shore platform. The platform has already been constructed in South Korea. Estimated construction cost is $400 Million.

The San Miguel Project was originally owned by Cities Service and Cities Service had entered into a project agreement with the Building Trades. However, the project agreement did not have a clause to make the agreement binding on successors. When Cities Service sold the entire project to Shell, Shell claimed that it was not bound by the prior project agreement.

When Shell commenced hearings for a county use permit, District Council 16 and U.A. Local 403 intervened. We presented testimony to the Board of Supervisors both on the employment and the environmental impacts of the project. Our testimony showed that local

people would remain unemployed while Shell brought in workers from other areas. Because these outside workers were not paid a living wage and because they don't have adequate health benefits, the workers and their families are likely to become a burden on publicly financed programs such as food stamps and hospital care.

We also presented expert testimony regarding the air quality impacts of the project. Air permits for off-shore oil platforms are granted by the U.S. Minerals Management Service (MMS). Neither EPA nor California air districts have any control over these emissions, and MMS does not require sufficient protection for air quality. The cumulative impact of the off-shore projects on on-shore air quality had not been examined. Our experts testified that the cumulative impacts of off-shore projects would cause violations of air quality standards in both San Luis Obispo and Santa Barbara Counties.

Shell finally responded to concerns about local hire by sending a letter to Jerry Cremins of the State Building Trades Council in which Shell committed to be bound by the project agreement with Cities Service. Shell also agreed that all successors would be bound by the agreement.

Shell asked us to withdraw our testimony about air quality in return for their commitment to the project agreement. We refused to withdraw any of that testimony as part of our policy that we will not withdraw public testimony on environmental issues in exchange for jobs. The County Board of Supervisors responded to the concerns that had been expressed about air quality by imposing extensive mitigation measures that should reduce off-shore emissions by one-third. These include construction of an off-shore electric cable, and use of

electric power, instead of diesel, for one-third of offshore power needs. The cost of compliance with these air quality mitigating measures is estimated to be $20 Million.

KERN BLUFF COGENERATION: KERN COUNTY

This project consists of 9 cogeneration plants in the 50 MW range. Each plant is projected to cost $35 Million. The electricity is to be sold to PG&E and the steam would be used on site in thermally enhanced oil recovery. The first of these projects by Power Systems Engineering of Houston was a 48 megawatt cogeneration plant proposed in the City of Bakersfield.

District Council 51 and U.A. Local 460 opposed this project on several grounds, including the legal inadequacy of the Bakersfield General Plan, the inconsistency of this project with the planned residential development of the area, and the failure to prepare an environmental impact report.

The Bakersfield Board of Zoning Adjustment unanimously approved the project, but we appealed to the City Council. At the hearing our appeal was supported by several local groups who were concerned about land use and environmental issues. The Council upheld our appeal and rejected the project by refusing to issue a conditional use permit.

The developer then approached the Building Trades and other local groups before commencing any new permit applications. The developer has now opened discussions with local groups to resolve the land use and environmental issues which led to the defeat of the first project. Furthermore, the developer has indicated that all nine plants will now be built with union labor and that union labor will be used for maintenance in six plants.

The Building Trades have negotiated project agreements for the first three facilities; and expect to have project agreements for the remaining six as those projects approach construction. The total estimate construction cost of all nine projects is $315,000,000.

USS-POSCO: CONTRA COSTA COUNTY

USS-POSCO is modernizing a steel finishing plant in Pittsburg, California. The project is estimated to cost in excess of $350 Million. The construction contract was awarded to BE&K of Birmingham, Alabama, a non-union contractor. USS-POSCO claimed that the contract with BE&K saved the company $45 Million over the bid from the lowest union contractor.

The Contra Costa Building Trades Council appealed a determination of the County Director of Community Development that the modernization project did not need a use permit from the Planning Commission. That appeal was filed with the County Board of Supervisors. Subjecting the plant to the use permit process would have resulted in a careful review of its environmental impacts. The appeal was based on our contention that the new project will generate approximately 50,000 tons of hazardous waste annually. USS-POSCO contended that the waste should not be counted as waste because it will be subjected to a treatment and partial recycling program. In April, 1987, the Board deadlocked 2 - 2 on a motion to grant the Building Trades' appeal. The fifth Board member abstained because her husband owned stock in USX, a part owner of the project.

After the Board vote, the Building Trades obtained an opinion from EPA that the waste from the USS-POSCO project was hazardous waste, but political pressure from

the company and an adverse court decision in another case regarding EPA's jurisdiction over recycled wastes caused EPA to retreat. The Board of Supervisors considered the matter again in November, 1987. The California Attorney General, John Van De Kamp, supported the requirement of a use permit for the project. Nevertheless, the Board deadlocked again.

The Building Trades have been extremely active on this project. A demonstration was held in front of the South Korean Consulate in San Francisco, because the company is half owned by a government controlled steel company in South Korea. There have been numerous demonstrations at the plant. Despite problem to hire 85% local labor, the company has now admitted that more than half the construction work force is from out of state.

Safety at the construction site has also been a major problem. Two workers have been killed in separate incidents, an extremely unusual death rate. Assemblyman Dick Floyd, at the request of several unions, held a hearing on safety issues in Pittsburg.

In December, 1987, the Bay Area Air Quality Management District issued a tentative air permit for the installation of equipment at the facility. District Countil 51 and the Contra Costa Building Trades Council have appealed the issuance of the permit. That appeal is currently underway and may be resolved within the next six months.

Additionally, USS-POSCO applied to the Regional Water Quality Control Board for an exemption from a new state law requiring it to clean up pits in which hazardous waste was stored. District Council 51 and the Building Trades opposed the exemption. The Board denied the exemption request for two of the pits, and

required further soil testing before acting on the remaining three. The Board also fined the plant $150,000 for an unlawful discharge into New York Slough. Hearings on the remaining three requests will be held in the late Spring of 1988. Additionally, the company's application for a new water discharge permit will soon be open for public review.

In an effort to avoid environmental review and to avoid our scrutiny in public forums, USS-POSCO has thus far proposed to install an estimated $7 Million in air pollution control equipment and $5 - $10 Million in hazardous waste recycling equipment that was not part of its original project. Despite these expenditures, and despite the continued deadlock of the Board of Supervisors, it now appears that both the Air Board and the Water Board will subject this project to substantial environmental scrutiny.

QUINTO RANCH: MERCED COUNTY

This was a large rocket motor manufacturing and testing facility proposed by United Technologies Corporation (UTC). Estimated construction for the entire project was more than 10 million hours. UTC intended to manufacture the minuteman missile at this site. District Council 51 and Local 437 opposed the project on a variety of land use planning and environmental grounds. The project was inconsistent with the County General Plan in several respects and would have involved burning spent rocket fuel in open pits. We also urged that, if approved, the project should be subject to a condition requiring the payment of prevailing wages for all construction.

There was significant support for a prevailing wage condition from the Board of Supervisors. Additionally, there did not seem to be any way around some of the land use and environmental objection without amending the County General Plan and without getting an amendment to the California state law on air quality. After our objections were made a matter of public record, additional local groups joined the fight and also hired attorneys.

After numerous hearings before the Planning Commission and the Board of Supervisors, the Board referred the matter back to the Planning Commission for further study on several environmental issues. The Board specifically requested that consideration be given to a prevailing wage condition. After additional hearings in front of the Planning Commission, the matter was returned to the Board of Supervisors. At that time, UTC withdrew its application in the face of strong opposition, and more importantly, serious legal obstacles.

We suspect that UTC may attempt to revive this project at some point in the future, so we will need to monitor the situation.

GWF COGENERATION PLANTS: CONTRA COSTA COUNTY

This is a proposal for five 20-megawatt power plants to be fired by coal and petroleum coke. The total construction cost of these plants is estimated at approximately $200 Million. The five plants are in the Antioch-Pittsburg area, one plant within the boundaries of each city and three plants in the unincorporated area. The Bay Area Air Quality Management District (BAAQMD) is reviewing applications for air permits for the facil-

ities, and is also acting as Lead Agency for purposes of reviewing the environmental impacts of the projects. District Countil 51 has participated in the BAAQMD's review of the projects, submitting comments on the Draft Environmental Impact Reports and on the Draft air permits. The BAAQMD expects to complete preparation of the Final EIR sometime in early to mid-February.

The developers of these projects approached District Council 51 and the Contra Costa Building Trades Council for project agreements. They had heard of District Council 51's activities with respect to the Signal project in Shasta County and of the activities of both groups with respect to the USS-POSCO project. These five plants utilize the type of combustion technology for air quality control that District Council 51 had advocated for the Signal project in Shasta.

Negotiations are still underway for a project agreement; but several of the Contra Costa locals have signed, and it is now expected that this project will use entirely union construction workers.

GWF COGENERATION PLANT: KINGS COUNTY

This is a 20 megawatt coal-fired power plant proposed for the City of Hanford in Kings County. The plant has been issued an air permit by the Kings County Air Pollution Control District. District Council 51 submitted comments on the air permit application for the District's consideration. The City originally issued a Mitigated Negative Declaration on the project. We submitted a letter to the Planning Commission analyzing the evidence which served as a basis for the Negative Declaration, and raising questions about the propriety of a Negative Declaration on this project. Additionally, we

commented about the impacts of the project on local labor and on the local economy.

In response to our environmental comments, the applicant and the City conducted a further analysis and provided detailed information. After examining this additional environmental analysis, we informed the City Council by letter that we believed the City now had sufficient information to make a determination regarding the project's environmental impacts.

In response to our economic comments, the contractor negotiated a project agreement with the local Building Trades to assure the use of local labor with decent wage levels and benefits.

The Attorney General subsequently challenged the City's Mitigated Negative Declaration, however, and GWF agreed to prepare an EIR on the Hanford project as well as two projects in Fresno County. The Hanford Draft EIR and Health Risk Assessment was issued in late October. We submitted extensive comments on both documents. A final EIR is currently in preparation.

The project is expected to obtain all its environmental clearances in the next few months and be in a position to proceed. The original project agreement has expired, but negotiations for a renewal of the agreement are underway.

GWF COGENERATION PLANTS: FRESNO COUNTY

Two 27 megawatt coal-fired cogeneration facilities are proposed for Fresno County. One is at a site between Selma and Kingsburg, and the other is near Monmouth. Total construction cost of both projects ie estimated at approximately $100 Million. District Countil 51 has participated in both the land use and the air quality reviews for the projects.

The Kingsburg plant will also require a Conditional Use Permit from the County. The County issued a Negative Declaration on the project's environmental effects. We appeared at a Planning Commission hearing on the Conditional Use Permit and Negative Declaration, arguing that the project raised potentially significant issues and that there had been an inadequate opportunity for public review. We also commented on the impacts of the project on local employment and local wage levels. The Commission denied the Conditional Use Permit on the ground that project raised issues that required further study.

The Monmouth project will require an air permit from the Fresno County Air Pollution Control District and a Conditional Use Permit from Fresno County.

The developer later agreed to prepare an EIR on both projects as a part of a settlement agreement with the state Attorney General's office. The Draft EIR was recently completed and we are currently preparing comments. Once the CEQA process is completed, the County will reconsider a Conditional Use Permit for the project.

In response to our concerns about employment impacts, negotiations for project agreements for these two projects have commenced.

THERMAL ENERGY DEVELOPMENT: SAN JOAQUIN COUNTY

This is a 23 megawatt agricultural waste-fired biomass power plant proposed for San Joaquin County near Tracy. Construction cost is estimated at approximately $35 Million. District Council 51 and Local 492 initiated an investigation of this project. Subsequently, the project developer met with the local Building Trades and entered

into a project agreement. Our investigation showed that the project would use best available control technology to reduce air emissions including ammonia injection to control nitrogen oxide emissions. We did not submit environmental comments on the project.

COYOTE CANYON: ORANGE COUNTY

This project consists of a landfill gas collection, flare system and cogeneration plant at a landfill in Orange County. The project was reviewed by several federal, state and local agencies. On the local level, permits were issued by Orange County and by the South Coast Air Quality Management District. District Council 16 and U.A. Locals 250 and 582 examined the air and waste discharge issues and closely monitored the project, including extensive discussion with regulatory authorities.

It appeared to us that the project would provide a net benefit to the environment, and we did not oppose the project. However, the developer became aware of our interest in the project and approached the Orange County Building and Construction Trades Council. Subsequently the Building Trades signed a project agreement with Ebasco for construction of the $34 million cogeneration component of the project.

CHEVRON COGENERATION: RICHMOND

Chevron has undertaken a number of projects notorious both for their adverse environmental impacts and for their use of non-union labor. For example, in 1986 District Council 16 had opposed approval of Platform Gale by the California Coastal Commission.

In 1987, Chevron proposed to construct a 99 megawatt gas-fired turbine cogeneration plant at the Chevron refinery in Richmond. Construction cost is estimated at approximately $200 Million. Chevron applied to the California Energy Commission for an exemption from the normal site certification proceedings claiming that this plant had a generating capacity of 100 megawatts or less.

District Council 51, supported by District Council 16, opposed granting the exemption on the basis that the plant would have a generating capacity greater than 100 MW. Evidence submitted in the record by Chevron showed that the generating capacity of the plant was 117 MW. Our expert testified that the facility would have a generating capacity of up to 117 MW. Witnesses for the CEC staff admitted that their own definition of generating capacity was not used in calculating capacity of the project. Our analysis of generating capacity was supported by PG&E.

Nevertheless, the Commission voted to determine that the plant had a generating capacity of 99.88 MW. We do not believe that this decision is even remotely justified by the record, but we elected not to institute litigation over it.

Our attention then shifted to the permit process of the City of Richmond since a conditional use permit would have been required. However, Chevron has chosen to defer construction of the project for at least three years because it has negotiated a power sales agreement with PG&E providing the plant with favorable rates.

BAXTER POLE: SHASTA AND TEHAMA COUNTY

This is a plant to treat utility poles and was originally planned for Shasta County. District Council 51 submitted comments on the draft EIR on the project in Shasta County. Baxter Pole actually withdrew its application there in the face of problems with groundwater contamination and air emissions.

The project is now proposed for a site in Tehama County. Baxter Pole hoped to avoid environmental review by selecting a site which is already zoned for industrial use, and so no discretionary County permits will be required.

Nevertheless, the County is acting as Lead Agency for purposes of CEQA review and is currently preparing a Draft EIR. We wrote to the County Counsel raising a question about the propriety of the County acting as Lead Agency under CEQA since it would have no discretionary approval over the project. We may raise this issue again in our comments on the Draft EIR. A Health Risk Assessment has been issued by the Air District, and we are currently preparing comments on that report. The project will require an air permit from the Tehama County Air Pollution Control District, and we will participate in the District's review.

PONDEROSA HOMES: UNION CITY

This is a 1300 unit Ponderosa Homes residential development project planned for Union City. Ponderosa has built on a non-union basis for several years. This particular project would be located in the northern portion of a 907 acre planning area on the western edge of Union City called the 511 Area. The area is currently undeveloped except for a sewer treatment plant and a closed

landfill. The area also includes substantial wetlands and endangered species habitat.

Several years ago the City began a comprehensive planning process to consider alternative uses for the 511 Area. In 1987 a Specific Plan was completed that called for deleting the industrial zoning in the 511 Area and increasing residential densities.

The 511 Area plan is extremely controversial, with a substantial number of local citizens organized in opposition to the plan. District Council 51 and U.A. Local 444 participated in three City Council hearings on the 511 Area plan, submitted extensive comments and expert testimony on traffic, public safety, school overcrowding, and wetlands issues. We also commented on the employment and economic impacts of a development that would not use local labor. Despite the significant opposition, the City Council approved the plan on a 4-1 vote.

However, with the help of Local 444 in gathering signatures, the local citizens group qualified a referendum measure that would overturn the Council's action. The referendum election is currently scheduled for March 8, 1988, and we are hopeful that the plan will be rejected by the voters.

PONDEROSA HOMES: SAN RAMON

This is a proposed 480 unit single family "upscale" residential development. The project is currently before the Planning Commission for approval. District Council 51 and U.A. Local 159 submitted comments to the Planning Commission on consistency with the general plan, creek and hillside protection, wildlife, visual impacts and noise issues. We additionally secured the participation

of the staff of the Department of Fish and Game on the wildlife and creek preservation issues. As a result of those comments the Planning Commission has already scaled the project back to about 450 units.

Hearings will continue before the City Council. Even considering the density reductions that have already been acted upon by the Planning Commission, we believe the current plan exceeds the density limits in the City's General Plan. In addition, the project is in the immediate proximity of Camp Parks, an Army Reserve training area and firing range. There are substantial noise impacts because Camp Parks is so close, and the EIR has not adequately evaluated those impacts.

This project is expected to remain controversial through the upcoming hearings before the City Council. We believe that further density reductions are required, and that more environmental study is needed.

OXFORD ENERGY: COLUSA COUNTY

This is a 29 megawatt biomass power plant, located near Williams in Colusa County. It is to use rice hulls for fuel. This project was originally proposed by Agrilectric Power Partners, Ltd. of Lake Charles Louisiana. Agrilectric selected Brown and Root as its general construction management contractor. District Council 51 submitted extensive comments to the local air pollution control district and to the Regional Water Quality Control Board. In response to our comments the Water Board staff removed the project from the Board calendar saying that they couldn't recommend approval in the absence of substantial further study and project redesign.

Agrilectric's decided not to pursue the project any longer, and Oxford Energy took over the project as

developer. Oxford has hired Atlantic Gulf as contractor. The project has been redesigned as a "zero discharge" facility, and the County has issued all necessary permits for the project. In January of 1988 we again submitted comments to the Regional Water Board opposing approval of the new project due to inadequate testing. In the meantime, the project proponent has commenced construction since water discharge permits are required before discharge, not before construction.

PRESLEY HOMES: CLAYTON

This is a proposed 1480 unit residential development of 1600 acres near Clayton in Contra Costa County. The developer originally intended to obtain all its approvals and commence construction by March, 1987.

However, U.A. Local 159 together with I.B.E.W. Local 302 and Sheet Metal Local 104 demonstrated that the development, as proposed, was not consistent with legal requirements. Because the project as proposed was inconsistent with the city general plan, the developer was forced to move approximately 500 units off the ridgeline and to covert over 400 units from single family to duplex. Additionally, as a result of park and open space requirements, the developer was obligated to donate and develop an additional 130 acres of parks. 800 additional acres was dedicated to permanent open space and protected by an open space easement.

Alterations that the developer wanted to make to Mount Diablo Creek would have required a permit from the Army Corps of Engineers. When the developer realized that, portions of the proposed golf course had to be relocated away from the Creek and certain flood control measures had to be abandoned.

We also helped convince the City Council to require the developer to pay for a grade separation of Clayton Road in the vicinity of the project and to install traffic signals and make other intersection improvements. We were also successful in forcing the residential development to be relocated away from a substantial archeological site. The developer will also be required to design both the residential development and the golf course in a manner that will preserve existing oaks.

We had repeatedly expressed our concerns about economic issues because Presley is generally non-union. However, the City Council refused to consider economic issues. Nevertheless, the project, as redesigned, is a significant improvement from an environmental perspective, and the dedications now required of the developer are significant public benefits. Final approvals have now been granted, and construction is expected to begin in the spring of 1988.

PREVAILING WAGE CONDITIONS

One of the initial elements of our program was to convince local governments to impose prevailing wage conditions on development projects. Progress in this effort is necessarily slow because it means convincing individual city councils and city attorneys that local agencies have the power to impose such conditions.

Nevertheless, several communities did respond with prevailing wage requirements in 1987. In Vallejo, the Redevelopment Agency imposed a prevailing wage requirement on a 180 room hotel project with an estimated construction value of $10 Million. The hotel will be located in the city's redevelopment area. The City Council of Vallejo, however, refused to impose a prevail-

ing wage condition on the Sky Valley Project, a development of 1131 residential units, a golf course, and commercial uses.

In South San Francisco, the City Council imposed a prevailing wage requirement on an eighty unit residential project as a condition of a use permit.

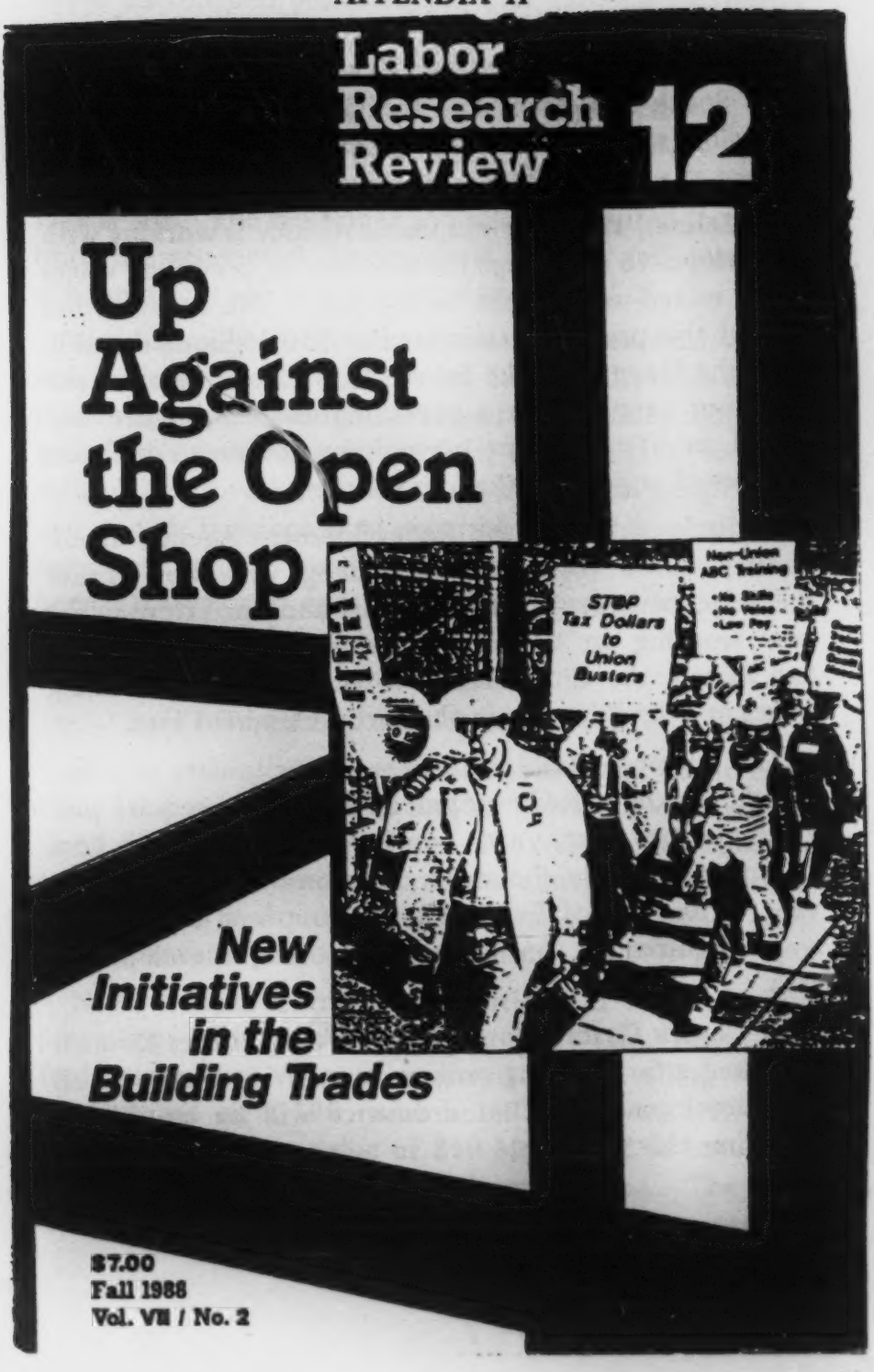
In Salinas, the Redevelopment Agency is working with a developer to encourage the payment of prevailing wages for a mixed-use project downtown. The construction cost of this project is estimated at $30 Million. In addition, the Mayor and the Salinas City Council are considering our proposal for a prevailing wage ordinance that would, in effect, require prevailing wages on a significant number of projects in that community.

In Redwood City, the Redevelopment Agency unanimously voted to require prevailing wages on future redevelopment projects. City staff and our attorney are now working on the final language of that policy. In San Mateo, the City Council voted to require prevailing wages in a development in their redevelopment area.

The Alameda Building Trades Council, after convincing the Oakland Redevelopment Agency to require prevailing wages last year, convinced the Oakland Port Commission to do the same thing on Port projects this year. The City of Emeryville also imposed a prevailing wage requirement on projects in their redevelopment area.

In Contra Costa County, the Building Trades Council proposed a far reaching ordinance on living wages for all new development. That ordinance will be considered sometime this year.

APPENDIX H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BUILDING COMMUNITIES OF INTEREST

CALIFORNIA PIPE TRADES PROTECTING THE ENVIRONMENT

Chris Bedford

The idea began with a series of discussions in 1985 between Tom Hunter, then business manager for Plumbers & Pipefitters Local 467 in San Mateo, California, and Tom Adams, an attorney who was expert in environmental lawsuits.

The two Toms shared the ride to Sacramento several times in a state legislative fight against the use of PVC pipe. Hunter opposed the pipe because it threatened his members' jobs. Adams opposed it on environmental grounds. "Adams had opposed us many times in the past," Hunter explains. "I knew how good he was, and it was good to be on the same side for once. I thought maybe he could help us in other fights."

During one of those rides, Hunter and Adams generated a notion that was to become the basis for the Northern California Pipe Trades' "Job & Community Protection Program" – a coordinated effort by unions and environmentalists to merge their interests and concerns in order to exert influence on economic development in their communities.

Combining traditional union political clout and job-site actions with intervention in the building and environmental permit process, the Job & Community Protection

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**Chris Bedford is president of the Organizing Media Project (OMP), based in Washington. He wrote and directed OMP's one-hour video on the Northern California Pipe Trades,* In the Community Interest.

Program has already had a significant impact on preserving both union jobs and environmental quality in California. But more than that, this unusual alliance establishes the potential of union-initiated coalitions to resist the corporate and developer blackmail that has been so successful elsewhere in pitting various community interests against each other.

Job Blackmail

Local construction unions have always participated in the building permit process. Traditionally, this participation has been in support of builders, with the primary goal being the creation of union construction jobs. Often, particularly on the construction of nuclear power plants, this put the union at odds with environmentalists.

But beginning in the mid-1970s, developers who sought union support in the environmental and construction permit process increasingly built large parts of their projects nonunion after securing those permits. As open shop constractors took larger and larger shares of the California construction market, union contractors found it harder and harder to compete. Corporations and developers forced double-breasting on many long-time union contractors and wage concessions directly on the unions.

At about the same time, in the late 1970s, corporations and developers mounted an offensive against environmental regulation that gained a substantial foothold in the Carter administration and then gained official sanction under Ronald Reagan. With Reagan appointees gutting the enforcement procedures of the EPA, OSHA and the NLRB, corporations and developers had unprecedented opportunities to blackmail communities.

Businesses fled union contracts and effective environmental regulation by moving their operations from the Frost Belt to the Sun Belt and to Third World countries like Mexico and the Philippines. U S. communities seeking new business were forced to bid for these runaway operations, promising corporations everything from relaxed enforcement of environmental laws and protection from union organizing to public subsidies in the form of tax breaks and industrial revenue bonds.

If a community did not agree to employer demands, it could lose prospective or existing jobs. Corporations openly engaged in job and environmental blackmail of communities desperate for new jobs.

"Job blackmail is a tactic that has been used against workers since the beginning of time." says Richard Grossman, former executive director of Greenpeace U.S.A. "And corporations are using the same tactic against environmentalists. Environmentalists and union members share a common interest in resisting this destructive, selfish form of corporate behavior."

In Northern California, local construction unions began to end their uncritical support of all development. After years of union-developer cooperation, a new truth had emerged. "We learned it was no coincidence," said a UA business manager, "that developers who wanted to cut corners on union wages were the same developers that demanded the largest tax concessions and whose projects posed the greatest danger to the environment."

"The challenge is to enforce standards that will clean up the environment *and* allow economic growth at the same time," says Tom Reed, scientific consultant to the Northern California Pipe Trades.

The Job & Community Protection Program

To meet this challenge, the Northern California/Northern Nevada Pipe Trades Council formed the Job and Community Protection Program to fight job and environmental blackmail by employers. The program has three separate components:

The Project Inventory

The program monitors construction permit applications in counties with participating local unions. A computerized report is issued, alerting local union business managers to upcoming construction activity in their area. Business managers contact developers to determine their plans: Do they plan to pay a prevailing wage? What kinds of environmental and economic impacts will the development have on the community? If the answers to these questions are not adequate, the BM attempts to bargain improvements, particularly for the workers who will build it.

Intervention in the Permit Process

If a development has serious environmental and economic problems, the program's environmental and legal consultants intervene formally in the permit process. This intervention is based on the public hearing process established by environmental and land-use planning legislation. The development's Environmental Impact Statement is studied and commented on, and the program's lawyers testify in public hearings before county planning commissions, boards of supervisors and state environmental communities. Union leaders approach politicians to ask for help in securing improvements in the environmental design of the project. These interventions often result in substantial improvements in both the environmental and economic impacts of a project.

Community Organizing

Some projects are environmentally too unsound to be built in certain places. Other projects have developers unwilling to bargain significant environmental and economic improvements. In these cases, he program helps the community organize to stop or significantly alter a project. Using newspaper ads, direct mail, and public meetings and rallies, the program alerts the community to the dangers posed by a specific development.

Union members pay for the program through a contribution to the J&CP Fund for each hour they work. In effect, union construction workers tithe their income to protect not only their own interests but those of their community as well.

The Struggle in Shasta County

The J&CP program has intervened in dozens of projects in California since 1985. One good example of how the program works is a 1986 battle with Allied Signal Energy Systems in Shasta County.

Allied Signal had applied for a permit to build and operate a woodwaste-fired power plant in the town of Anderson. It proposed to produce electricity by burning waste from Northern California's large wood products industry. After reviewing the company's request, the county planning commission voted unanimously to allow the project to be built without prepration of an Environmental Impact Report.

Tom Johnson, a UA business manager in Redding, California, became concerned about the project because he felt that Allied Signal's anti-union and environmental record at other locations warranted a closer review of their plans.

The county had recently experienced the economic and social impact of a nonunion construction project. A smaller bio-mass power plant had been built in Birney using nonunion workers, most of whom were from out of state. Wages were so low that workers and their families lived in tents in a campground near the construction site. Few residents of Birney got the jobs they had been promised when the plant was first discussed.

The principal environmental concern was air quality. The county had a serious ozone problem produced by the burning of fuels. Already over the California ozone standard, the Signal plant would push county air quality over the federal ozone limit and thereby threaten the loss of federal highway and development funds. Local doctors also were concerned about the effect on older people with respiratory problems, many of whom had retired to Shasta County, ironically, because of the clean environment.

The Job & Community Protection Program, in alliance with the Shasta County Building Trades, formally intervened in the permit process and forced Signal to prepare an Environmental Impact Report. The Report raised questions not only about oaone, but about particles in the air called PM-10. Local health professionals joined construction union leaders to organize citizen opposition to the plant; a labor-initiated community group, Shasta Citizens for Responsible Industry, did a mailing to all 55,000 voters in the county, receiving 7,000 memberships in response.

Although this intervention ultimately was unable to stop the plant from being built, significant improvements in the emissions control equipment came about as a result of the effort. And, though the Shasta plant

was built nonunion, Allied Signal agreed to use union labor in building six other plants in California.

The J&CPP's intervention in dozens of projects over the past two years has had an impact throughout the state. Today many developers sit with union and environmental leaders before entering the permit process, negotiating changes to protect the community's interest. At a garbage-burning power plant in San Diego, the developer approached the building trades unions before applying for permits in order to work out the employment and environmental details of the project. The same was true at another power plant project in Washington state. In addition, eight other new power plants are being built in California with union labor and to community environmental standards.

Up Against USS/POSCO

California employers have not, of course, rolled over and played dead in the face of this new labor-environmental alliance. They have employed every tactic at their disposal, including lawsuits charging that the unions' environmental interventions are a "sham" and (they've actually used the term) "job blackmail." The employer counterattack has reached its peak in "the largest nonunion construction job in Northern California history" – the USS/POSCO modernization of a steel mill in Pittsburg, California.

U.S. Steel (USS), now a division of USX Corp., announced plans in 1986 to spend $350 million to modernize its Pittsburg plant in partnership with the Pohang Iron & Steel Co. (POSCO) of South Korea. Like many USS plants, the Pittsburg facility is in need of substantial modernization if it is to remain competitive in today's

international steel market. Under the proposed plan, unfinished steel from POSCO's Kwangyang Plant will be imported to be rolled into sheetmetal at Pittsburg. In South Korea, POSCO steel sells for $320 a ton, more than $300 less than the same product costs to produce in the vaunted Japanese mills. In the Pittsburg deal, POSCO gained a substantial foothold in the U.S. market, and USS secured raw steel at a price that would allow it to make large, some say "unholy," profits.

USS/POSCO awarded the modernization construction contract to a subsidiary of BE&K Inc. of Alabama. BE&K's presidnet, Ted C. Kennedy, is one of the founders of the anti-union Associated Builders and Contractors (ABC), and another BE&K subsidiary is currently providing strike-breakers to the International Paper Co. The three actors on the employer side – USX, POSCO and BE&K – are perhaps the three hardest-line, most vicious anti-union corporations in the world.

On average, the wages being paid on the USS/POSCO job are $7-$15 an hour under union rates in the area. To help its union contractors, UA Local 159 in Martinez offered to work for 80% of their regular wages, but to no avail. "There was no way we could compete with the nonunion bid," says 159 BM Dennis Gifford. Greg Freere, secretary-treasurer of the Contra Costa County Building Trades, charged that more than three-quarters of the workers on the job were from out of the area, and that since they had no health insurance from their employer, these "out-of-state scabs" were draining local public health resources.

The USS/POSCO project has become the target of two separate coalitions of building trades unions – one, a coalition of unions commonly known as "the Heavy High-

way Group" (Laborers, Carpenters, Operating Engineers), and the other, including all the mechanical trades (Plumbers & Pipefitters, Electrical Workers, Sheet Metal Workers, Boilermakers). The USS/POSCO/BE&K team has had some success in attempting to play all the unions in the Pittsburg drama against one another. Steelworkers, for example, have been told that the construction unions' campaign against the companies could jeopardize the modernization project and threaten their jobs. And, there are internal divisions between the two building trades groups.

Led by the Northern California Pipe Trades, the mechanical trades have used the Job & Community Protection Program against USS/POSCO. Initially, the unions joined with Contra Costa environmental groups to support a county toxics ordinance that would require special permits for any facility that produced, stored or disposed of toxic substances. The law was passed, but the county ruled that the USS/POSCO project was exempt because its building application was filed before the law was passed; the J&CPP is appealing this ruling. Currently, the coalition is seeking to force USS/POSCO to obtain Air Quality Permits from both the state and federal governments for the air pollution that the increased ship traffic from Korea will produce in California ports.

As Phase I of the three-phase construction project nears its halfway point, there is evidence that USS/POSCO is feeling the pressure. Phase I's mechanical portion was about to begin in mid-summer, and a small union contractor with a dozen union pipe-fitters was on the job – something BE&K ordinarily detests. And some unionists see signs that Phases II and III may go union.

Conclusion

In a time of increased international competition, with communities desperately seeking new jobs, how can workers and citizens assert their community's interest in economic development?

Since 1969, laws at all levels of government have established the right of citizens to have a voice through public hearings in how economic development affects their community's natural environment. But there are no laws similarly protecting the community's economic interests. Under current statutes, any economic development that does not unacceptably damage the natural environment is defined as in the community interest. Jobs, any kind of jobs, are welcomed by most communities.

But how much do these jobs pay? Can young workers own homes and raise families with the wages paid? Can older workers expect a reasonable pension? What kinds of health benefits will workers have? What kinds of local businesses will the development support? Workers and citizens should have a right to determine the answers to these questions – perhaps by requiring *Economic Impact Statements* of all new development. If unions were to advocate such a process, as a means of protecting wages and standards, they'd fine plenty of community allies, including environmentalists. The Northern California Pipe Trades' Job & Community Protection Program has shown the way.

No. 93-945

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FEB 18 1994
OFFICE OF THE CLERK

PETROCHEM INSULATION, INC.,
Petitioner,

v.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, DISTRICT COUNCIL 51 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, AND 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER,
Respondents.

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2 E. KINTNER, FEDERAL ANTITRUST LAW (1980)
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6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE, §1476 (2d ed. 1990) 19

INTRODUCTION

Respondents respectfully request that the Court deny the Petition for Certiorari, which seeks review of an unpublished *per curiam* decision of the Ninth Circuit.

The Ninth Circuit affirmed dismissal of Petitioner's Sherman Act Section 1 claim for three independently sufficient reasons, none of which presents any novel or unsettled issue warranting certiorari. First, Petitioner alleged only unilateral conduct, and therefore failed to satisfy the fundamental requirement of showing joint action in order to state a claim for a "combination, contract or conspiracy" in restraint of trade. *See* Part I(A), *infra*. Second, Petitioner's claim of "sham petitioning" is squarely precluded by this Court's decision last term in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. --, 123 L. Ed. 2d 611 (1993), because Petitioner has pleaded no facts suggesting that Respondents' petitioning was "objectively baseless" as required to state a claim. *See* Part I(B), *infra*. Third, Petitioner failed to satisfy the requirement, common among the circuits, that a plaintiff must allege injury to competition in order to state a Section 1 claim in a rule of reason case. *See* Part I(C), *infra*. Each of these bases for dismissal is well supported by settled antitrust principles and raises no issue warranting review.

Likewise, the Petition's objection to dismissal of claims not preserved for appeal does not warrant certiorari. This argument merely objects to the Ninth Circuit's long-established and well-recognized procedures for preserving issues for review. *See* Part II, *infra*.

STATEMENT OF THE CASE

Petitioner filed this action with great fanfare and press coverage in December 1990, attempting to characterize the Defendants' union organizing and First Amendment-protected petitioning efforts as criminal conduct subject to the harsh remedies of the RICO and antitrust laws. SER 69

App. A.[1] Petitioner claimed that the unions had attempted to expand their members' job opportunities through allegedly 'sham' public participation before city councils or permit boards in permitting proceedings; that the unions had, by such petitioning, sought union-only contracts that allegedly violated Section 8(e) of the National Labor Relations Act ("NLRA"); and that the unions had, by allowing employers to transmit union members' dues to their unions under a "dues checkoff" procedure, allegedly violated the NLRA's proscriptions against illicit employer payoffs of unions. For each of these claims—some of which are no longer pressed in this Court—Petitioner eschewed the remedies that would have been available under the NLRA had any improper conduct actually occurred. Instead, Petitioner—and the anti-union organization which sponsored and funded this litigation[2]—sought to silence the unions and their attorneys by the *in terrorem* impact of RICO and antitrust claims, which threatened treble damages and massive costs of defense against an expansive, but seriously deficient Complaint. The problem with this approach, as recognized by the courts below, was the utter failure to plead facts constituting RICO or antitrust violations.

Petitioner is a non-union insulation subcontractor that claims it lost four opportunities to bid for construction projects as a result of Respondents' actual or threatened petitioning activity in opposition to permits for those projects. Second Amend. Cmplt. (Pet. App. E) ¶¶8, 54, 57, 67, 74. Petitioner's action sought over $3 million in damages, naming as Defendants some nineteen local plumbing and pipe-fitting unions (the "Locals"); a District Council of the Locals; Thomas J. Hunter, the business manager of the District Council; and one of the unions'

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[1]The Appendix to the petition for certiorari is referred to as "Pet. App." The appendix to this brief is referred to as "Resp. App." Excerpts and supplemental excerpts of the record in the Ninth Circuit are referred to as "ER" and "SER," respectively.

[2]Petitioner's litigation has been funded by the Associated Builders and Contractors' "Construction Legal Rights Foundation." SER 69, App. A.

attorneys—Thomas R. Adams, a well respected member of the bar specializing in environmental law—and his law firm. Pet. App. E ¶¶9-32. The initial complaint alleged that Respondents had conspired to commit criminal extortion and racketeering by threatening to appear at public hearings to oppose non-union construction projects. ER 169-70. The Respondents' participation in such proceedings was entirely appropriate in light of both the broad parameters of such agency decision making, and the legal standards for permit issuance, which consider the general public welfare. *See* note 9, *infra*. Nonetheless, Petitioner alleged that, for the four construction projects at which Petitioner would have bid for subcontracts, Defendants' "extorted" from project developers union-only project agreements which allegedly violated Section 8(e) of the National Labor Relations Act.

The District Court, the Honorable Eugene F. Lynch, dismissed the initial complaint without prejudice on April 30, 1991. Resp. App. A. Although Petitioner claimed that Respondents' opposition to projects were "sham," the District Court noted that Petitioner had provided no factual support for its "claims that the defendants threatened to make permit objections 'without regard to merit'" as to *any* of the four projects. *Id.* A-3 n.2. It chastised Petitioner for its deceptiveness in addressing the legal issues, noting that Petitioner had engaged in a "radical misreading [of the key authority] which vainly attempts to patch together a back-stop argument out of quotations taken out of context." *Id.* A-13 n.10. Following *Butchers' Union, Local 498 v. SDC Investment, Inc.*, 631 F. Supp. 1001 (E.D. Cal. 1986), the District Court held that the RICO extortion claims were preempted by the National Labor Relations Act. However, the court allowed Petitioner to file a motion for leave to amend, noting the possibility of an antitrust claim. ER 124 n.11.

On May 31, 1991, Petitioner filed such a motion, attaching a proposed First Amended Complaint attempting to assert antitrust claims based on the same four construction projects and alleging a new set of RICO claims based

on employers' transmittal of union members' dues to the defendant unions. SER 32. After a hearing, the District Court denied leave to file the proposed First Amended Complaint, finding it facially inadequate. Resp. App. B at B-2. At the hearing, the court expressed serious concern about the overbreadth and generality of Petitioner's pleading: "it's not detailed enough, it's not specific enough, and, frankly, your pleading has led to the expenditure of a lot of time and money." ER 82. It noted that there were "many, many ambiguities and/or omissions"; "you can say people conspired, but you've got to start naming names and tell us when, who was there, when did it happen, what date." ER 92.

Although the District Court granted Petitioner leave to file a Second Amended Complaint, it also entered a written order delineating precisely the elements required to plead an antitrust claim. Resp. App. B at B-2 to B-3. The court directed that, for any supposedly illegal union-only project agreement, Petitioner was to identify the parties to such an agreement by name and describe to the extent possible the agreement's terms. *Id.* ¶3(a)(i). For any other alleged conspiracy or combination between unions and non-union entities, Petitioner was to identify the parties by name and describe their common scheme. *Id.* ¶3(a)(ii). Petitioner was also directed to plead the injury to competition resulting from any alleged antitrust violation. *Id.* ¶3(c).

Petitioner's Second Amended Complaint (Pet. App. E) attempted to plead antitrust claims, one under Section 1 of the Sherman Act and one under Section 2.[3] Despite the District Court's detailed instructions on pleading the elements of antitrust claims, the Second Amended Complaint still failed to do so. The District Court, noting that it "had been enormously patient with the plaintiff, not

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[3]It also purported to assert the three RICO claims relating to employers' transmittal of union members' dues to the unions. No issue is raised in the Petition as to the Court of Appeals' affirmance of the District Court's dismissal of those claims.

only entertaining three attempts to [plead but also] providing guidance to plaintiff in that endeavor," dismissed each claim for relief for multiple reasons. Pet. App. B at 18a. In particular, it found that Plaintiff still "failed to allege that defendants have threatened or pursued *a single meritless objection to any construction project*, much less identify that objection or allege why such an objection should be considered meritless." Pet. App. B at 31a (emphasis added). Thus, despite the repeated and corrosive accusations of meritless or "sham" proceedings contained in Plaintiff's Petition, Judge Lynch found that the Second Amended Complaint in fact does not identify or describe even *one* "sham" proceeding in which Respondents participated.[4]

The Court of Appeals affirmed. With respect to the Section 2 claim, it held that (1) the complaint failed to allege that the defendants possessed monopoly power in the relevant market (the pipe and insulation subcontracting market in Northern and Central California); (2) the defendants assertedly unlawful activities were unilateral, and therefore could not achieve monopoly power by combination with some actual participant in the relevant market; and (3) for the same reasons no attempted monopolization

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[4]Although the Second Amended Complaint identifies numerous construction projects, it asserts that the unions took a losing position in opposition to only one, Allied Signal, where one aspect was allegedly "*continued* long after it was clear that Defendants' claims had no merit." Pet. App. E ¶48 (emphasis added). However, even the allegations as to Allied Signal fail to describe the grounds of Defendants' objections, let alone *why* they were supposedly without merit. In fact, the attachments to the Complaint reveal that the objections to Allied Signal were hardly frivolous. They prompted the United States Environmental Protection Agency to commence an action against the project for violation of the Clean Air Act (*id.* Exh. 2 at 3), and Allied Signal eventually settled Defendants' objections by making substantial *environmental* concessions. *Id.* Exh. 3 at 93, Exh. 2 at 3, Exh. 1 at 20. Moreover, Allied Signal was not one of the four projects on which Petitioner claimed it lost potential business, and Plaintiff makes no contention that it was injured in any other respect on that project.

claim could be stated. Pet. App. A at 5a.[5]

With respect to the Section 1 claim, the Court of Appeals affirmed dismissal on several independent, alternative grounds. *First*, Plaintiff's allegations of "sham" petitioning alleged only unilateral action by labor union parties and therefore could not support a Section 1 claim for a combination in restraint of trade. Pet. App. A at 4a. *Second*, under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. --, 123 L. Ed. 2d 611 (1993), objectively nonfrivolous petitioning is shielded from antitrust liability "*regardless* of anticompetitive intent or purpose." Pet. App. A at 3a-4a. *Third*, despite the District Court's directions to plead any injury to competition, Plaintiff had failed to do so; "[r]ather, it merely alleges injury to its own business," and "[m]ere injury to [plaintiff's] own position as a competitor is insufficient to state an antitrust claim." *Id.* at 3a. "'[I]t is injury to the market, not to individual firms, that is significant.'" *Id.* (quoting *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1973)).

REASONS FOR DENYING THE PETITION

Petitioner seeks review only of the rejection of its claim under Section 1 of the Sherman Act and the dismissal (on jurisdictional grounds) of its attempt to appeal the District Court's April 30, 1991 order dismissing its extortion and RICO claims.[6] As suggested by the Court of Appeals'

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[5]The Petition raises no issue with respect to the Court of Appeals' disposition of the Section 2 claim. *See* note 6, *infra*.

[6]Petitioner does make reference to Section 2 of the Sherman Act in Question 1. *See* Petition at i. However, the issue addressed in that question—whether the complaint adequately alleged "sham petitioning"—is unrelated to the Ninth Circuit's grounds for rejection of the Section 2 claim, e.g., failure to allege monopoly power in the relevant market. Moreover, Petitioner makes no reference whatever to its Section 2 claim in the body of the Petition.

(continued...)

issuance of its *per curiam* opinion in unpublished form, in neither respect does this case raise any issue meriting review in this Court.

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[6](...continued)

In any event, the Court of Appeals' disposition of the Section 2 claim was plainly correct and presents no issue meriting review here. An indispensable element of a claim for monopolization is the monopolist's possession of monopoly power in the relevant market. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Likewise, as this Court confirmed just last term, a claim for attempted monopolization requires a dangerous probability of monopolization, as shown by the defendant's economic power in the relevant product and geographic market. *Spectrum Sports, Inc. v. McQuillan*,–U.S.–, 122 L. Ed. 2d 247, 259 (1993).

The Second Amended Complaint defined the relevant market as "construction sub-contracts for the installation of piping and insulation . . . ." Pet. App. E ¶35. Respondents are not in the pipe and insulation subcontract market, but rather provide labor to that market, thus operating at a different level of commerce. The Court of Appeals correctly held that, as a matter of law, it is impossible for Respondents, acting unilaterally, to monopolize or attempt to monopolize the subcontracting market since they have no share of that market and, indeed, are unable to supply any subcontracting services. *See Genser v. IBEW, Local 134*, 522 F. Supp. 1153, 1155 (N.D. Ill. 1981) ("It is logically impossible for the Union, acting alone, to monopolize or attempt to monopolize the electrical contracting business. Monopoly power depends on the possession of sufficient control of the relevant market to constitute a monopoly. The relevant market is that area of goods or services in which the defendant competes. The Union's relevant market is labor, not the electrical contracting business; thus the Union could not unilaterally monopolize or attempt to monopolize the electrical contracting market" (citation omitted)).

The District Court acknowledged that a different issue would be presented if the complaint had alleged that Respondents had conspired to file meritless proceedings with market participants having actual or potential monopoly power. Pet. App. B at 29a. It found, however, that the complaint failed to allege any such conspiracy with non-union parties, despite its prior order directing that any supposed co-conspirators and scheme be specified in the pleadings. *Id.* at 29a-30a; Resp. App. A ¶3(a)(ii). The Court of Appeals agreed. Pet. App. A at 5a ("The defendants' alleged activities under Petrochem's § 2 claim are *unilateral*").

I.

THE NINTH CIRCUIT'S REJECTION OF THE SHERMAN ACT SECTION 1 CLAIM WAS CORRECT AND RAISES NO ISSUE MERITING REVIEW.

In this Court, Petitioner defines its Section 1 theory as a "scheme by union groups" to engage in "sham petitioning" in order to "obtain agreements between owners of projects, the union groups and union signatory contractors by which those owners agree to cease doing business (refuse to deal) with non-union contractors . . . ." Petition at i. The rejection of this Section 1 claim by both the District Court and the Court of Appeals was correct and raises no issue meriting further review.

A. The Ninth Circuit Correctly Held That Allegations Of Unilateral Sham Petitioning Do Not State A Valid Claim Under Section 1 Of The Sherman Act.

Petitioner's Section 1 claim rests upon allegations that Respondents engaged in "sham petitioning" activity as a means of furthering their allegedly anticompetitive purposes. But Petitioner fails altogether to address--let alone show error in--the Ninth Circuit's unremarkable holding that allegations of *unilateral* "sham petitioning" do not suffice to state a Section 1 claim.

Both lower courts found that the complaint nowhere alleged that the assertedly sham petitioning activity was undertaken pursuant to an agreement or conspiracy with non-union parties.[7] This conclusion--which Petitioner does

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[7]Of course, to the extent that the complaint alleged that such activities were undertaken pursuant to an agreement between labor union parties, the statutory exemption from the antitrust laws for concerted activity by and between labor union parties would be applicable. *See United States v. Hutcheson*, 312 U.S. 219, 232 (1941). The District Court found that the statutory exemption applied because, despite that court's prior direction to identify any alleged non-labor group conspirators (Resp. App. B

(continued...)

not challenge--is fatal to its Section 1 claim. Section 1 prohibits a "contract, combination . . . or conspiracy, in restraint of trade," not unilateral conduct. 15 U.S.C. §1; *see United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). 2 E. KINTNER, FEDERAL ANTITRUST LAW, §§9.7, 9.17 (1980) ("Section 1 is directed only at joint action").

B. In Addition, The Complaint Failed To Allege "Sham Petitioning" As Defined In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. – (1993).

The heart of Petitioner's current Section 1 theory is its allegation that Respondents engaged in "sham petitioning" in order to further their assertedly anticompetitive agenda. Such claims are governed by this Court's recent decision in *Professional Real Estate Investors*. In that case, the Court explained a two-part definition of sham petitioning:

> "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals

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[7](...continued)
¶3(a)(ii)), the complaint "does not mention any participation by or conspiracy with union contractors or subcontractors in the sham petitioning activity." Pet. App. B at 29a; *see also id.* at 30a. The Court of Appeals agreed that the complaint "alleges only unilateral action" and for that reason fails to state a Section 1 claim. Pet. App. A at 4a.

> 'an attempt to interfere *directly* with the business relationships of a competitor' through 'the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.' This two tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." (123 L. Ed. 2d at 623-24 (emphasis in original; citations and footnote omitted))

Because Petitioner's claim failed to satisfy *Professional Real Estate*'s first requirement of showing objectively meritless proceedings, the lower courts properly dismissed it.

In its original ruling dismissing the first of Petitioner's successive complaints, the District Court observed that Plaintiff had failed to provide any factual basis for its vague assertions of sham petitioning and said that in any future pleading Petitioner must provide specific details. ER 85-88, 110 n.2. In dismissing the Second Amended Complaint, the District Court held that Petitioner again "fails to allege that defendants have threatened or pursued a single meritless objection to any construction project, much less identify that objection or allege why such an objection should be considered meritless." Pet. App. B at 31a. The Ninth Circuit affirmed on this ground, citing *Professional Real Estate Investors, Inc.* Pet. App. A at 3a-4a.[8]

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[8]In this Court, Petitioner continues to pepper its papers with accusations of "sham" or "meritless" participation that are supported neither by reference to the record nor by the facts. The Petition's repeated assertions that Respondents have "admitted" pursuing meritless objections, or being uninterested in the results of the permit process flagrantly mischaracterize the record. In fact, the complaint and exhibits Petitioner attached show exactly the opposite. The unions become involved in the permitting process only "if there are meritorious objections" that appear after closely examining the environmental, (continued...)

Petitioner vaguely acknowledges that under the first prong of the two-prong test established in *Professional Real Estate Investors*, the defendant's "subjective intentions" are irrelevant. Petition at 21. It could hardly contend otherwise: "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." 123 L. Ed. 2d at 621. Yet, Petitioner does not claim that the courts below overlooked allegations that identified even one instance of petitioning activity that is "sham" within this definition.[9] Instead, it apparently contends that

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[8](...continued)
planning or other issues. Pet. App. E ¶77. Only where there are "serious environmental and economic problems" do the unions participate. *Id.* Exh. 3 at 91. Moreover, where the unions have participated, they have obtained major improvements reducing pollution from numerous projects. E.g., *id.* at 121a, 123a, 125a, 129a.

[9]This case is not the usual case of alleged "sham" litigation, as the complaint alleges no judicial proceedings brought by Respondents. Instead, Petitioner complains generally of public participation by Respondents in open administrative or quasi-legislative proceedings addressing permit applications. As the Ninth Circuit noted in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), in this context the broad parameters for agency decision-making render it difficult for any petitioning activity to qualify as baseless. 542 F.2d at 1079. Permit proceedings are not commenced or caused by opponents of the project, but by the owners' filing of an application for a permit. Environmental review is required by state law, which establishes a public comment period for anyone who chooses to participate. CAL. PUB. RES. CODE §21092(a). Similarly, land use approvals are conducted under the California Planning and Zoning Law and local ordinances, which generally require hearings open to the public on discretionary permit approvals. Many of the hearings are legislative and the approval process for these is essentially a political one. The issue is generally whether a land use restriction bears "real or substantial relation to public health, safety, morals or general welfare." *Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 604 (1976) (citation omitted). Under the California Environmental Quality Act (CAL. PUB. RES. CODE §§21000-21178.1), a project that will have adverse environmental impacts may be approved only if the agency finds that the project is justified by "specific economic, social or other considerations."
(continued...)

Respondents' petitioning activity was "sham" because the unions' *goal* was assertedly to secure union-only project agreements that would allegedly violate Section 8(e) of the National Labor Relations Act.

Petitioner's legal theory was definitively rejected by this Court just last term. Respondents' "motive" or "purpose" for engaging in petitioning activity is irrelevant to satisfying the first step in the two-step test established in *Professional Real Estate Investors*: "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." 123 L. Ed. 2d at 624. The "sham" theory which lies at the heart of Petitioner's Section 1 claim is squarely foreclosed by *Professional Real Estate Investors*.[10]

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[9](...continued)
Debate is free-ranging, with business competitors, neighbors, and ordinary citizens expressing their views. "Petitioning" here means submitting comments to public officials or agencies who have solicited comments; it does not mean commencing a lawsuit against an applicant. Especially in this context, nothing in the complaint alleged anything approaching "baselessness." *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988) (greater immunity applies to advocating legislative and executive, as opposed to judicial, action).

[10]Because Petitioners' Section 1 claim foundered on the first prong of *Professional Real Estate Investors* (and also because of the failure to allege injury to competition, the issue discussed in the following section), the Ninth Circuit did not find it necessary to address the further issue of whether the complaint adequately alleged a scheme to enter into illegal "hot cargo" agreements. Hot cargo agreements may, under some circumstances, infringe Section 8(e) of the National Labor Relations Act. If they do, that may—in some circumstances (*see Richards v. Nielsen Freight Lines*, 810 F.2d 898, 906 (9th Cir. 1987))—be the basis of a Section 1 claim under *Connell Construction Co. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975).

Petitioner has not briefed these issues and they are not fairly presented by the Petition. Suffice it to say that Petitioner's implication that agreements to use union contractors are broadly proscribed by the antitrust laws is dead wrong. To the contrary, a union-only project

(continued...)

[10](...continued)
agreement does not violate the antitrust laws unless it violates Section 8(e) of the NLRA. *Sun-Land Nurseries, Inc. v. Southern Cal. Dist. Council of Laborers*, 793 F.2d 1110, 1115, 1117 (9th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 1090 (1987). *Accord, A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853, 856-57 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075 (1985). And although *outside* the construction context hot cargo agreements are generally proscribed by Section 8(e), such agreements are explicitly authorized for the construction industry by the "construction industry proviso" to Section 8(e) when the agreements arise in relation to collective bargaining. 29 U.S.C. §158(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 648 (1982). Congress viewed the validity of such agreements in construction as "necessary to avoid serious damage to the pattern of collective bargaining in *[that] industr[y].*" *Id.* at 656 (quoting S. REP. No. 51, 86th Cong., 1st Sess., 105 CONG. REC. at 17899 (1959) (emphasis in *Woelke*)).

Moreover, the requisite collective bargaining relationship can be established by a "pre-hire" agreement to use union-only labor, as authorized by Section 8(f) of the NLRA. 29 U.S.C. §158(f); *A.L. Adams Constr. Co.*, 733 F.2d at 856-57. "[A]n employer, although largely involved in nonconstruction industries, may take advantage of § 8(f) [and enter into a pre-hire agreement] if it is sufficiently engaged in construction work at one site." 733 F.2d at 857. Or, if a developer has subsidiaries or related entities which employ labor in the construction industry, then union-only project agreements are allowed. *Id.* at 857-58. And a developer that manages its project or acts as its own general contractor may enter pre-hire agreements—even if it does not perform any of the work itself. *Id.* Thus construction unions have the right to seek and obtain union-only project agreements; and by complying with the foregoing principles, unions can ensure the legality of those agreements.

For this reason, the actual identity of the parties to a particular union-only agreement, coupled with its terms, is critical to any determination of its legality or illegality under Section 8(e) and—hence—under the antitrust law. Recognizing this, after rejecting the Section 1 claims in the First Amended Complaint, the District Court issued detailed pleading instructions with which Petitioner was to comply in amending its antitrust claims. Resp. App. B ¶3(a)(i). The District Court found that, despite its instructions as to exactly how any union-only project agreement needed to be alleged, the Second Amended Complaint still failed to allege the parties to or the terms of any agreements alleged to have violated Section 8(e). Pet. App. B at 19a-23a. Because Petitioner failed to provide this critical information, no illegality of any union-only

(continued...)

C. Finally, The Court Of Appeals Correctly Held That Petitioner Had Failed To Allege Injury To Competition.

In the District Court, Petitioner claimed that it did not need to allege facts showing injury to competition because, it contended, it had alleged a *per se* violation of Section 1. *See* Pet. App. B at 23a. On appeal, it abandoned this position, claiming instead that its complaint adequately had alleged the injury to competition required in a rule of reason case. *See* Appellant's Opening Brief at 20-23.[11] The Ninth Circuit disagreed, finding that Petitioner had failed to allege injury to competition. Pet. App. A at 2a-3a.

Petitioner acknowledges, as it must, that in a rule of reason case, the plaintiff must show an injury to competition. *See* Petition at 11 ("Petitioner does not challenge the rule that an injury to competition is usually necessary to state a claim for violation of Section One of the Sherman Act"). This fundamental proposition is well-established. *See, e.g., NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984) ("Under the Sherman Act, the criterion to be used in judging the validity of a restraint on trade is its impact on competition"); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31 (1984) (in rule of reason case, plaintiff has burden of showing "actual adverse effect on competition"); 7 P. AREEDA, ANTITRUST LAW ¶1502 (1986).

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[10](...continued)
project agreement could be found from the incomplete information provided in Petitioner's pleadings.

[11]Petitioner attempted to revive its *per se* theory in its reply brief. The Ninth Circuit properly refused to consider an issue raised for the first time in a reply brief. *See Eberle v. City of Anaheim*, 901 F.2d 814, 817-18 (9th Cir. 1990). Failure adequately and properly to raise an argument in appellate briefs waives those claims and issues. FED. R. APP. P. 28(a)(4); *Brady v. Gebbie*, 859 F.2d 1543, 1557 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100 (1989).

Petitioner's point seems to be that even though at trial it will be required to *prove* an injury to competition, it should not have been required by the District Court and the Court of Appeals to *plead* one. The Ninth Circuit has long required antitrust plaintiffs to allege in their complaints facts showing an injury to competition. *See, e.g., Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989); *Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 858 F.2d 567, 570 (9th Cir. 1988); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811-12 (9th Cir. 1988). Other circuits have the same rule. *E.g., Banks v. NCAA*, 977 F.2d 1081, 1087-88, 1094 (7th Cir. 1992) (majority and dissenting opinions), *cert. denied*, 124 L. Ed. 2d 247 (1993); *Garshman v. Universal Resources Holding, Inc.*, 824 F.2d 223, 231 (3d Cir. 1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 250-51 (2d Cir. 1985); *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 488 (8th Cir. 1985); *Quality Foods, S.A. v. Latin American Agribusiness Dev. Corp.*, 711 F.2d 989, 997 n. 9 (11th Cir. 1983); *A.D.M. Corp. v. Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir. 1980); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979). These cases are fully consistent with this Court's reminder that in antitrust cases, federal trial judges have "the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen'l Contractors, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519, 528 n.17 (1983); *see generally* Brunet & Sweeney, *Integrating Antitrust Procedure and Substance After* Northwest Wholesale Stationers, 72 VA. L. REV. 1015, 1066-74 (1986). As an earlier Ninth Circuit opinion explained:

> "This limitation on the reach of the Sherman Act is reflected in our repeated injunctions that section one claimants must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market." (*Les Shockley*, 884 F.2d at 508)

Petitioner identifies no conflict in the circuits on this point, and suggests no reason why the well-established requirement that injury to competition be pleaded should be questioned.

Petitioner stretches the limits of advocacy in contending that this pleading issue involves a question "left open" (Petition at 11) by *Summit Health Ltd. v. Pinhas*, 114 L. Ed. 2d 366 (1991). Nothing in *Pinhas* purported to alter the fundamental element of injury to competition for a Section 1 rule of reason claim. Nor did that case even remotely address pleading requirements for that element. *Pinhas* dealt only with the issue of whether the jurisdictional requirements of the Sherman Act had been satisfied—*i.e.*, whether any cognizable affect on interstate commerce had been established sufficient to invoke federal jurisdiction, a question different from whether injury to competition has occurred to establish liability for an unreasonable restraint of trade. The Court's opinion quotes *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 243 (1980) for the proposition that meeting the jurisdictional requirement may be founded upon "either unlawful purpose or an anticompetitive effect." The Court held that, to invoke federal jurisdiction, the plaintiff was not required to assert an actual effect on interstate commerce because the jurisdictional analysis "focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy was successful." 114 L. Ed. 2d at 375. Moreover, the cases cited in *McLain* dealt with *per se* violations. Thus, nothing in *Pinhas* or the cases which preceded it raises any doubt as to the necessity of pleading injury to competition in a rule of reason case.

In the end, the Petition apparently asks this Court to review the determinations by the Ninth Circuit and the District Court that the particular complaint in this case failed adequately to allege an injury to competition sufficient to pass muster in a rule of reason case. *See* Petition at 11-14. That fact-specific question presents no issue meriting review

in this Court.[12]

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[12]Moreover, that issue was correctly resolved by the District Court (*see* Pet. App. B at 23a-25a) and by the Ninth Circuit. Petitioner's current theory of injury to competition is that the allegedly sham petitioning has resulted in union-only project agreements on four construction jobs, and that this restriction means that four of the nine insulation subcontractors in the relevant market (Northern California) were excluded from these four projects because they are "non-union" shops. But despite its length and prolixity, the Second Amended Complaint (Pet. Ex. E) contained none of the facts from which injury to competition could be determined. For example, it contained (1) no allegation as to the share of the market the four non-union subcontractors had before the allegedly unlawful union-only project agreements were made; (2) no allegation as to what share of the market the four non-union subcontractors had after those project agreements; (3) no allegation as to the market share, either before or after the union-only project agreements, of the union shop subcontractors; (4) no information as to the proportion of potential construction projects in the relevant market covered by the assertedly wrongful union-only project agreements (*compare* Pet. App. E ¶¶37-38 (listing more than 95 projects) *with id.* ¶80 (admitting that many of those projects were *not* constructed pursuant to a union-only contract)); (5) no information as to the total dollar volume of construction projects in the relevant market covered by the allegedly unlawful union-only project agreements; (6) no information as to whether there are any barriers to entry in the relevant market, in the absence of which insulation subcontractors from outside the relevant market could bid on projects; and, most importantly (7) no information as to the impact—if any—of the allegedly wrongful union-only project agreements on prices or output in the relevant market.

Petitioner argues that it was sufficient to allege that four of the nine insulation subcontractors in the relevant market were non-union shops. This, it asserts, amounts to an allegation of "a forty-five percent reduction in the number of subcontractors in the relevant market." Petition at 12. That is completely false. Nowhere did the complaint allege that four (or, for that matter, any) of the insulation subcontractors were driven out of the market. It did not even show that those four subcontractors were excluded from a significant share of the available projects. Indeed, of the complaint's admittedly incomplete list of 95 projects, the complaint identified only a handful for which contractors allegedly could bid only if they would build the project with union labor. *See* Pet. App. E ¶¶52-74; *see also id.* ¶80 (acknowledging that many of the projects were not built pursuant to a union-only project agreement).

(continued...)

II.
PETITIONER'S REQUEST FOR RELIEF FROM ITS FAILURE TO FOLLOW A SETTLED NINTH CIRCUIT REQUIREMENT DOES NOT MERIT REVIEW IN THIS COURT.

In the last section of its Petition, Petitioner seeks relief from this Court for its failure below to follow the well-established Ninth Circuit procedural requirement of replead-

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[12](...continued)

In sum, the complaint does no more than allege that one non-union insulation subcontractor was unable to bid for an unspecified percentage of jobs in the relevant market. But, even assuming that the same would be true of the three other non-union insulation subcontractors there remained at least five different union contractors competing for those insulation jobs and no indication of the existence of any special barriers to entry of even more competitors. There was no allegation, and no reason to presume, that competition would not remain strong and vital in the relevant market. The complaint contained no allegation that having only five available insulation subcontractors, instead of nine, for those jobs restricted to union subcontractors drove prices up, drove output down, or impaired the availability of services. As the District Court correctly determined, even if many more projects were performed by union contractors, this "does not equate with the conclusion that the subcontracting market is any less competitive." Pet. Ex. B at 24a-25a n.8.

On this issue, Petitioner identifies no conflict between the decision of the courts below and decisions of other circuits. It erroneously alleges inconsistency between this case and an earlier decision of the Ninth Circuit, *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988). In *Oltz*, a hospital entered into an exclusivity contract with a group of anesthesiologists, thereby excluding the plaintiff, a nurse anesthetist. While it is true that the court found sufficient injury to competition, it was not—as Petitioner claims—simply because the number of competitors was reduced by one. The result of the exclusivity contract was to create a monopoly service provider (the group of anesthesiologists). Moreover, by a special verdict the jury found that as a result "the *price* of anesthesia services and the *incomes* of the M.D. anesthesiologists rose dramatically . . . ." 861 F.2d at 1448 (emphasis added). That is precisely the kind of impact on the market that constitutes an injury to competition. And it is precisely the type of allegation that Petitioner still failed to make in its Second Amended Complaint—even after the trial court had specifically instructed Petitioners to plead facts constituting injury to competition. Resp. App. B ¶3(c).

ing in an amended complaint, on a protective basis, dismissed claims for which a party wishes to preserve appellate review. In seeking this relief, Petitioner misstates the facts, the applicable law and the procedural requirement itself.

The principle applied by the Court of Appeals relies on the precept that an amended pleading supersedes prior pleadings. It requires that when a motion to dismiss is granted with leave to amend, any of the dismissed claims for which subsequent review may be desired must be repleaded, on a protective basis, in the amended pleading. This principle—which is not claimed by Petitioner to conflict with any federal statute or rule—has the salutary effect of placing in a single amended pleading all claims on which a later appeal may be based. Contrary to Petitioner's characterization (Petition at 26-27), this principle does not preclude review after any amendment. It precludes review only where, as here, the claimant amends without repleading, even on a protective basis,[13] any of the dismissed claims, thereby indicating their abandonment. *E.g.*, *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) ("a plaintiff waives all causes of action in the original complaint which are not alleged in the amended complaint"); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150*, 440 F.2d 1096, 1098 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971) ("Plaintiffs, in the present case, omitted the common law conspiracy claim from their

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[13]One practice under this principle is simply to include in the amended pleading a verbatim rendering of any of the dismissed claims for which appellate review will eventually be desired, with a short proviso stating that the pleader respectfully acknowledges the prior ruling dismissing the claim(s) and includes them in the amended pleading solely to preserve review. By doing so, the pleader makes clear that it does not seek to relitigate the trial court's prior ruling. *See also* 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE, §1476 at 559 (2d ed. 1990) (the same may be accomplished by "adopt[ing] some or all of the averments of the original pleading in conformity with the incorporation by reference practice permitted by rule 10(c)" (footnote omitted)).

third amended complaint[; b]y doing so, they waived any right to attack on appeal the District Court's ruling dismissing these claims").

Petitioner gives the impression that this principle stems in the Ninth Circuit from a lone decision involving a pro se litigant. This is not so. This principle has been the law in the Ninth Circuit since shortly after the adoption of the Federal Rules of Civil Procedure in 1938 and has been reaffirmed in the reported case law ever since. *E.g. King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150*, 440 F.2d 1096, 1098 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971); *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967); *Rogers v. Alaska Steamship Co.*, 290 F.2d 116, 124 (9th Cir.), *cert. denied*, 368 U.S. 901 (1961); *Studio Carpenters Local 946 v. Loew's, Inc.*, 182 F.2d 168, 170 (9th Cir.), *cert. denied*, 340 U.S. 828 (1950). Thus, far from being "an example of bad facts making bad law" (Petition at 27 n.8), this principle is a matter of long-settled practice in the Ninth Circuit.[14] Indeed, the Ninth Circuit specifically declined en banc to review this principle in this very case. Pet. App. C.

Petitioner asserts for the first time in this Court that it "tried to restate in shorthand form its original complaint in the first amended complaint." Petition at 28. This assertion is false. Petitioner's first amended complaint contained two antitrust claims and three RICO claims. These RICO claims

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[14]Petitioner cites to cases from certain other courts in which this requirement of repleading was not imposed. It is not surprising that procedural practices differ in their details among the several circuits. Indeed, each circuit and district court is authorized to adopt, and has adopted, local rules of practice consisting of rules like the one at issue here. 28 U.S.C. §2071(a). The local rules adopted by the respective lower federal courts differ significantly among themselves. Variation among the several circuit and district courts in the details of their procedural practices does not require remedial action by this Court. To the contrary, such variation is contemplated and expressly authorized by 28 U.S.C. Section 2071.

were predicated on alleged violations of 29 U.S.C Section 186—a labor law statute regulating payment of union dues—whereas the original complaint contained only RICO claims predicated on asserted violation of state and federal extortion laws through public petitioning. Nothing in the first amended complaint remotely resembled Petitioner's original RICO extortion claims.[15] Petitioner also asserts that the District Judge precluded it from repleading its original claims. Petition at 28. This is incorrect and highly unfair to Judge Lynch. Petitioner never attempted to replead, on a protective basis to preserve review, its original RICO claims in its amended pleadings, nor did it ever seek leave to do so. Had it stated any desire to do so, neither the District Court nor Respondents would have had the slightest objection.

Finally, Petitioner argues, without explanation, that the requirement of repleading dismissed claims to preserve appellate review "invites piecemeal appeals." Petition at 29. This makes no sense. The requirement has no effect on how or when an appeal is taken. It merely regulates how issues are preserved for appeal (as do, for instance, requirements for objections to evidence or jury instructions at trial, or post-trial motions). If anything, the principle discourages

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[15]Petitioner's original RICO allegations asserted that Respondents' petitioning activity was a violation of state and federal extortion laws. Respondents moved in the District Court to dismiss these claims on numerous grounds including: (1) that threats to participate in the political process are protected by the First Amendment and therefore are not criminalized by the racketeering laws (*see I.S. Joseph Co. v. J. Lauritzen A/S*, 751 F.2d 265 (8th Cir. 1984); *National Organization for Women, Inc. v. Scheidler*, 62 U.S.L.W. 4073, 4077-78 (Jan. 24, 1994) (Souter, J., concurring); (2) that the conduct at issue was in furtherance of legitimate labor objectives and therefore could not have been extortion (*United States v. Enmons*, 410 U.S. 396 (1973); (3) that Congress did not intend, through RICO, to criminalize conduct governed by the NLRA (*United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982); and (4) that the RICO claims were preempted by the NLRA. The District Court granted the motion on the latter ground, without reaching the other issues. Resp. App. A.

piecemeal appeals by prescribing a plain and simple method for identifying and preserving appellate rights on all issues.

In sum, Petitioner misstates law and fact in an effort to gain relief in this Court from Petitioner's own failure to adhere to settled[16] procedural principles. Whether Petitioner's abandonment of its initial legal theory was inadvertence or a conscious decision later regretted, the Ninth Circuit's settled practice presents no occasion for review by this Court.

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[16]In passing, Petitioner characterizes the procedures at issue as "a trap for the unwary," but stops short of asserting that it was unaware of them. Indeed, it was Petitioner, not Respondent, that first brought this issue to the attention of the Court of Appeals in its Opening Brief below.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

DATED: February 17, 1994

Respectfully,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETROCHEM INSULATION, INC.,

Plaintiff,

vs.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNSEL, District Counsel 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER,

Defendants

No. C-90-3628 EFL

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

I. SUMMARY

This action is brought by Petrochem Insulation, Inc., an open shop subcontractor, against multiple defendants comprised of union organizations, local union chapters, and their attorneys. The complaint asserts that the defendants have conspired to threaten and have threatened to petition at public permit hearings to coerce various developers to enter into agreements to employ union-only labor. Such agreements, termed "hot cargo" agreements, violate section 8(e)

of the National Labor Relations Act, 29 U.S.C. section 158(e).[1] This practice, the complaint asserts, constitutes criminal extortion under California law and the federal Hobbs Act. The criminal extortion, in turn, allegedly constitutes the predicate act for the criminal liability of defendant under the Racketeering Influence and Corrupt Organizations Act (hereinafter "RICO") Defendants have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This Court has proper jurisdiction pursuant to 28 U.S.C. § 1331.

The defendants' motion to dismiss presents several questions, but the Court's disposition of the case requires it to reach but one: whether plaintiff's RICO claims are preempted by the NLRA because the predicate act alleged, criminal extortion, is founded upon a violation of the National Labor Relations Act properly under the jurisdiction of the National Labor Relations Board (NLRB). This Court finds preemption is proper. Accordingly, plaintiff's complaint is dismissed without prejudice.

II. STATEMENT OF THE FACTS

The complaint avers the following: plaintiff is a nonunion insulation prime contractor and sub contractor. One of plaintiff's major markets is the installation of insulation in cogeneration and alternative fuel power plants. The construction of such plants requires numerous permits and licenses from land use and environmental permitting agen-

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[1]Section 8(e) provides, in pertinent part: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void."

cies. Plaintiff alleges that significant delays in the permitting process can reduce or destroy the economic viability of such construction projects. Since 1988, plaintiff contends that Tom Adams has worked in conjunction with Thomas Hunter and District Council 51 to increase the unions share in the construction market by extorting developers. In particular, plaintiff alleges that the defendants have threatened to petition and to object at permit proceedings, without regard to the merit of their objections, in order to coerce developers into entering into hot cargo agreements.[2] These agreements require a developer to use only construction contractors and subcontractors who have collective bargaining agreements with union organizations. In addition, to coercing a specific developer, one goal of defendants' activities was to make the developer an "object lesson" to other developers, thereby influencing them to hire union labor.

The complaint does not allege that the plaintiff itself was ever extorted or threatened. Rather, the plaintiff opines that, as a non-union subcontractor, it has lost work opportunities, and attendant profits, as a result of "extortionate" tactics of the defendants.[3]

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[2]Plaintiff claims that the defendants threatened to make objections "without regard to merit," but does not provide factual support. Indeed, the plaintiff does not identify the substance of the threatened objections anywhere in the complaint. Because it is not necessary to determine their merit in order to adjudicate the motion to dismiss, the Court shall assume without deciding that the objections were without merit.

[3]The group of defendants named is comprised of union organizations, local union chapters, and their attorneys. Specifically, the complaint avers that defendant District Council 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is an unincorporated labor association whose members are local unions; defendant Thomas J. Hunter is the business manager of District Council 51: defendant United Association of journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO is the union organization

Specifically, the complaint indicates four matters whose repercussions affected the plaintiff. *First*, plaintiff was foreclosed from bidding on a biomass cogeneration project in Woodland, California, because defendant Local 447 induced the project's prime contractor to agree to employ only union contractors by threatening to file environmental objections unless he did so. *Second*, plaintiff alleges that it lost the opportunity to bid upon the five cogeneration plants to be built by GWF Power Systems Company. Although the developer, M.W. Kellog Company, initially requested plaintiff to submit a bid for subcontract work, the energy producer, GWF Powers Systems Company, later informed them that the project was a union-only contract and therefore Petrochem was precluded from bidding unless it employed union labor. Without specifying the causal relationship, plaintiff alleges that this change of heart occurred due to defendants' extortionate threats. *Third*, plaintiff avers that the defendants' "unlawful acts" and "conspiracy" required the General Electric Company to boycott open-shop contractors when awarding contracts for the Burney Cogeneration Plant construction project, thereby preventing plaintiff from receiving a contract. *Fourth*, plaintiff alleges that it failed to obtain a chance to bid for a Chevron project as a result of threats by defendant Adams to file environmental impact objections unless Chevron agreed to use union contractors.

Plaintiff's complaint denominates three causes of action all arising under RICO. The first cause of action is for violation of 18 U.S.C. section 1962(c), which prohibits participation through a pattern of racketeering activity in the

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that chartered District Council Number 51; defendant Local Unions 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662 are all local unions located in either California or Nevada; defendant Thomas R. Adams is a lawyer, associated with defendants Thomas R. Adams, P.C. and defendant Adams & Broadwell, P.C., who has worked with District Council 51.

affairs of an enterprise engaged in interstate commerce.[4] The second cause of action is for violation of 18 U.S.C. section 1962 (a), which makes it unlawful for any person who has received income derived from racketeering activity to use it in an enterprise engaged in interstate commerce.[5] The third cause of action is for a conspiracy to violate the sections cited above, itself a violation of 18 U.S.C. section 1962(d).[6]

All three of plaintiff's causes of action rely upon criminal extortion as the predicate act of racketeering bringing defendant's activity within the proscription of the RICO Act. Plaintiff's theory of extortion is that the defendants' tactics were wrongful because their objective was to gain property, hot cargo agreements, to which they were not rightfully entitled because they violate the NLRA.

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[4]18 U.S.C. section 1962(c) provides, in pertinent part, "It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[5]18 U.S.C. section 1961(a) provides, in pertinent part, "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in . . . establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[6]18 U.S.C. section 1962(d) provides that "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

III. DISCUSSION

A. The Standards For Dismissal under Fed. R. Civ. P. 12(b)(6)

A motion to dismiss for failure to state a claim may only be granted if it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts that could be proved. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). On a motion to dismiss, a court presumes the facts alleged in the complaint to be true. *Halet v. Wend Invest. Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982). In addition, a court must draw every reasonable inference from the complaint's allegations in the plaintiff's favor. *Retail Clerks International Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Thus, a court may reasonably infer a fact from the facts properly alleged. *See id.*; *see also Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963). Although a court is bound to give deference to plaintiff's allegations, it is improper for a court to assume that a plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

B. Even Assuming that Defendants' Acts Constitute the RICO Predicate Act of Criminal Extortion, the Claim of Extortion is Wholly Dependant Upon an Unfair Labor Practice and is Therefore Preempted by the NLRA.

1. Overview of the Elements of Criminal Extortion.

To bring its action within the purview of RICO, plaintiff must sufficiently allege the requisite "pattern of racketeering activity." 18 U.S.C. section 1961 lists the acts, known as 'predicate acts' encompassed by the definition of "racketeering activity." one such predicate act, as defined in 18 U.S.C. section 1961, is extortion under state law or extortion or

attempted extortion under the Hobbs Act, 18 U.S.C. § 1951.[7]

"Extortion" is defined by the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear." 18 U.S.C. section 1951(b)(2). The definition is substantially the same under California law. The courts have developed a substantial body of case law construing the operation of this definition. In particular, courts have focused upon the interrelation of the "means," here the "use of . . . fear," the "ends," the obtaining of "property," and the over-arching modifier of both, "wrongful."

With respect to the "means," plaintiffs allege that defendants threatened to lodge objections at public permit hearings, without regard to merit, in order to cause the developers concern that the proceedings would be slowed, approval delayed, and as a consequence, their projects' profitability would he diminished. It is well-settled that fear of economic loss, not only fear, of physical harm, is encompassed by the Hobbs Act. *United States v. Cusmano*, 659 F.2d 714, 715 (6th Cir. 1980), *cert. denied*, 467 U.S. 1252 (1984); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), *cert denied*, 450 U.S. 916 (1981) ; cf. United States v. Gates, 616 F.2d 1103, 1106 (9th Cir. 1980) (inducing payments to avoid county business tax).

With respect to the "ends," courts have broadly construed the property element of extortion under the Hobbs Act as including tangible as well as intangible property rights. The concept of property includes the property right to make

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[7]18 U.S.C. section 1961 provides, in pertinent part, " 'racketeering activity' means . . . any act or threat involving . . . extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year; [and] any act which is indictable under . . . title 18, United States code section 1591. . . ."

business decisions free from wrongful coercion. *See e.g. United States v. Zemek*, 634 F.2d at 1174; *see United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) (right to make business decisions free from outside pressure wrongfully imposed); *cf. Battaglia v. United States*, 383 F.2d 303 (9th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968) (right to lease space in bowling alley free from threats).

Finally, the meaning of "wrongful" under the Act has engendered judicial debate. In *United States v. Enmons*, 410 U.S. 396, 400 (1973), the Supreme Court attempted to provide guidance. The Court observed that on the face of the Hobbs Act, "wrongful" modifies each of the enumerated means of obtaining property, i.e., actual or threatened force, violence or fear. *Id.* at 396. Congressman Hobbs, the sponsor of the legislation, himself indicated that "wrongful" was to modify the entire section. *Id.* at 399, fn. 2. However, the Court reasoned that "wrongful,, must also be read as limiting the statute's coverage to instances where the extortionist's obtaining of property was wrongful because he lacked a lawful claim to it: "The term 'wrongful' . . . would be superfluous if it only served to describe the means used. For it would be redundant to speak of 'wrongful violence' or 'wrongful force' since . . . any violence or force to obtain property is 'wrongful.' Rather, 'wrongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Id.* at 400.[8]

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[8]The Supreme Court's analysis indicated that "wrongful" does not *only* serve to modify the means, but also to modify the end, the taking of property to which the extortionist has no lawful claim. Certain progeny of *Enmons* have interpreted the case to mean that "extortion" requires the employment of an unlawful means to pursue an unlawful end. *See e.g. Hall American Center Associates Ltd. Partnership v. Dick*, 726

Plaintiff's entire theory of criminal extortion is founded upon the proposition that defendants' threats to petition, which are asserted to have induced economic fear, were "wrongful" solely because the defendants sought thereby to obtain property, hot cargo agreements, to which they were not legally entitled because such agreements violate the NLRA. In its long complaint, plaintiff indicated only generally the property wrongfully obtained, as "tangible and intangible property rights, including the right to make business decisions free from wrongful coercion." However, in its memorandum in opposition to the motion to dismiss, and at hearing, plaintiff indicated more narrowly that the property allegedly extorted was hot cargo agreements. Indeed, its whole theory of extortion rested upon this premise. In its memorandum, plaintiff explained its theory in light of *Enmons'* holding that the obtaining of property is "wrongful" because the alleged extortionate does not have a lawful claim to it: "Because the subject property, the "hot cargo" agreement, is not a lawful claim, *Enmons* cannot provide the defendants with immunization from charges of extortion."[9] At hearing, plaintiff strenuously argued that defendants, threat to petition was "wrongful" only because they sought to trade the right to petition for "illegal" hot cargo agreements. Because plaintiff has represented to the Court that the illegal agreements are the "property" subject to extortion, and indeed rested its whole argument upon that premise, the Court exercises its discretion to view that representation as a judicial admission of fact. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988) (statements of fact contained in a brief may be

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F.Supp. 1083, 1095 (E.D. Mich. 1989); *U.S. v. Traitz*, 871 F.2d 368, 381 (3rd Cir. 1989).

[9]In addition, plaintiff's opposition described the extortionate act as trading environmental objections for an unlawful promise from an owner to cease doing business with other employers, i.e., for a "hot cargo" agreement.

considered admissions of the party in discretion of the district court).

Under plaintiff's theory, in sum, criminal extortion is the predicate act for the RICO cause of action. The claim of criminal extortion, in turn, is wholly dependant for its "wrongfulness" on the notion that its objective was an illegal property, a hot cargo agreement forbidden by the NLRA. in short, defendants' underlying conduct is extortionate and wrongful only by virtue of the labor laws. Because plaintiff's RICO claim is thus based upon an unfair labor practice, it is preempted by the NLRA.

2. Preemption of RICO Claims by the NLRA.

Congress carefully crafted federal labor laws and created agencies to administer them in order to strike a delicate balance between the forces of labor and management. Congress originally gave the National Labor Relations Board exclusive jurisdiction over unfair labor practices as set forth in the National Labor Relations Act. 29 U.S.C. section 160(a). *Butchers' Union, Local No. 498, etc. v. SDC Invest., Inc.*, 631 F. Supp. 1001, 1006 (E.D. Cal. 1986). However, Congress later created exceptions to the NLRB's exclusive jurisdiction, permitting certain unfair labor practices to form the basis of causes of actions in federal court. 29 U.S.C. section 187(b); *Butcher's Union*, 631 F. Supp. at 1006, citing *Constar Inc. v Plumbers Local 447*, 568 F. Supp. 1440 (E.D. Cal. 1983), *aff'd* 748 F.2d 520 (9th Cir. 1984); *also citing International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 241-42 (1952). Therefore, although the general rule known as the preemption doctrine is that NLRB jurisdiction preempts the jurisdiction of federal courts, *Amalgamated Asso. of Street, etc. v. Lockridge*, 403 U.S. 274, 276 (1971), the preemption doctrine does not apply if it is unfair to infer that Congress

intended the NLRB to have exclusive jurisdiction over the matter. *Vaca v. Sipes*, 386 U.S. 171, 179 (1967)

Butchers' Union, Local No. 498 is the leading case on the issue of whether a RICO claim predicated upon violations of the federal labor laws is preempted by the NLRA. In a learned and thoughtful opinion, Chief Judge Karlton addressed the issue of whether Congress, in enacting the RICO statute, intended to create an exception to the NLRB's preemptive jurisdiction over actions arising under the NLRA. There, the plaintiff, a union, brought a RICO action against an employer. The plaintiff alleged three different acts as the requisite predicate acts for RICO liability: *First*, a violation of the Labor Management Relations Act's ban on "sweetheart contracts," under 29 U.S.C. section 186; *Second*, mail fraud under 18 U.S.C. section 1341; and *third*, wire fraud, under 18 U.S.C. section 1343. The first predicate act was one directly proscribed by the labor laws. The latter two, mail and wire fraud, were generic predicate acts not necessarily related to the labor law. However, in the case of *Butcher's Union*, the acts underlying the fraud claims were argued to constitute fraud wholly because the underlying acts were unfair labor practices. In short, the claims of fraud rested wholly upon violations of labor law.

The court first examined the predicate act founded upon "sweetheart" contracts in violation of section 186. It concluded that Congress had expressed its intent to except RICO claims based on section 186 violations from preemption by the NLRA because Congress had specifically included a violation of that labor law statute as a predicate act under RICO. 18 U.S.C. section 1961(l). Moreover, noted the Court, section 186 was the *only* labor law whose violation Congress had specifically enumerated as a predicate act for RICO liability. "[T]he inclusion of section 186 violations as predicate acts suggests that Congress was being

selective as to what activities were being removed from the ambit of the exclusive jurisdiction of the labor law." *Id.* at 1009. Because of its inference that Congress intended to be selective when removing labor law violations from the pre-emptive jurisdiction of the NLRB, the court reasoned that "[t]he violation of no other labor statute constitutes a RICO predicate act." *Id.* at 1009.

In accord with this logic, the *Butchers' Union* court held that where RICO liability is predicated upon violation of a generic, non-labor statute, such as mail fraud, and the violation of that statute is predicated upon an unfair labor practice which otherwise falls within the NLRA, the RICO claims are preempted by the NLRA. The Court acknowledged that there was little legislative history addressing preemption where the acts complained of constituted predicate acts on the grounds that they violated a generic statute, such as mail fraud, and at the same time constituted unfair labor practices subject to the NLRB's exclusive jurisdiction. Lacking the guidance of legislative history or Congressional intent, the Court relied upon the accepted holdings of labor law preemption. *Id.* at 1010, *citing Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497, 504 (9th Cir. 1985) (accepted principles of labor law preemption should govern where statutory or congressional guidance lacking). The court, relying on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), observed that a claim is generally preempted if it is arguably within the NLRB's jurisdiction. In *Butchers' Union*, the plaintiff relied upon mail fraud and wire fraud as requisite predicate acts for RICO liability. However, plaintiff's complaint alleged that the use of the mails and the wires perpetrated a fraud only because it deprived plaintiff's rights under the labor laws. Because liability for the predicate acts of mail and wire fraud statutes was "wholly dependant on the labor laws," the

court held that RICO claims were preempted by the NLRA. *Id.* at 1011.[10]

Subsequent federal cases have applied the *Butchers' Union* test for preemption. Each has found that if the RICO predicate acts were based on generic statutes, such as mail and wire fraud, and, in turn, the conduct underlying the predicate acts was wrongful only by virtue of the labor laws, the RICO claim was preempted by the NLRA. *Brown v. Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212, 1224-26 (N.D. Ill. 1988) (NLRA preempts RICO claims where conduct underlying generic RICO predicate acts also constitutes an unfair labor practice under NLRA). *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368, 371 (S.D. Ill. 1990) (where predicate acts of mail fraud, wire fraud and extortion are all based solely upon violation of labor laws, RICO claims are preempted by NLRA). *See also MHC, Inc. v. International Union, United Mine Workers*, 685 F. Supp. 1370, 1374-80 (E.D. Ky. 1988) (RICO claim based on predicate act of mail fraud, involving alleged violation of NLRA, was preempted).

The facts of the instant case bring it within the purview of the *Butchers' Union* analysis and, accordingly, lead to the same result of preemption. The complaint asserts that criminal extortion pursuant to the Hobbs Act and California law constitutes the predicate act for its RICO claim. However, the claim of criminal extortion is wholly dependent upon a violation of the NLRA. Plaintiff's theory is that defendants' use of fear of economic harm was extortionate because they sought to obtain property, an agreement, to which they were not lawfully entitled only because the agreement violated Section 8(e) of the NLRA. In short, defendants' liability

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[10]The Court's reading of *Butcher's Union* makes obvious its view that plaintiff's reading of the case is, in actuality, a radical misreading which vainly attempts to patch together a back-stop argument out of quotations taken out of context.

for criminal extortion is wholly dependent on a violation the labor laws. Accordingly, because the only predicate acts alleged are bottomed upon violations of the labor laws, the RICO claims are preempted by the NLRA. The Court dismisses plaintiff's complaint without prejudice.[11]

IT IS SO ORDERED.

DATED: April 30, 1991.

EUGENE F. LYNCH

EUGENE F. LYNCH
United States District Judge

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[11]Plaintiff has not formally filed a motion for leave to file an amended complaint. However, plaintiff's papers make certain intimations that the complaint ought to be read to assert anti-trust claims. The memorandum in opposition turns for support to the "sham exception" of the Noerr-Pennington doctrine in anti-trust. In a letter to the Court dated April 1, 1991, plaintiff mentions in passing that it alleges "an unlawful conspiracy" to engage in conduct "prohibited by the anti-trust laws." Such is a revelation to one who reads the complaint. It contains no causes of action based upon the anti-trust laws and makes no mention of the anti-trust laws. However, it is possible, on the facts alleged, that plaintiff may be able to allege an anti-trust cause of action and proceed upon that theory even though preemption bars its RICO claims. Accordingly, plaintiff's complaint is dismissed without prejudice. Plaintiff is granted 25 days from the date of this order to move the Court for leave to file an amended complaint for the limited purpose of pleading non-RICO claims. Because plaintiff's RICO claims are barred by preemption, plaintiff should not seek to employ amendment as a collateral attempt to replead them. If plaintiff chooses to amend, it should attach a memorandum of points and authorities *and* a copy of the amended complaint indicating the newly-amended or added sections.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETROCHEM INSULATION, INC.,

Plaintiff,

VS.

NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNSEL, District Counsel 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER,

Defendants.

No. C-90-3628 EFL

ORDER DENYING RECONSIDERATION AND DENYING LEAVE TO FILE FIRST AMENDED COMPLAINT

Plaintiff's Motion for Reconsideration of Dismissal of RICO Action Based Upon NLRA Preemption Or For An Appealable Order As To This Cause of Action, and plaintiff's Motion for Leave Of Court To Amend Complaint came on regularly for hearing on July 19, 1991. The Court having considered the moving, opposing and reply papers,

and good cause appearing therefore, it is hereby ORDERED:

1. That plaintiff's Motion For Reconsideration is denied, as are plaintiff's request for certification under Fed. R. Civ. P. 54(b) and plaintiffs request to amend *nunc pro tunc.*

2. That plaintiff's Motion For Leave Of Court To Amend Complaint is hereby denied insofar as it seeks leave to file the proposed "First Amended Complaint" submitted with said motion.

3. Plaintiff is granted leave to file an amended complaint, within 45 days of the July 19, 1991 hearing, to allege claims other than the extortion claim under RICO which was dismissed without leave in the Court's April 30 Order. The proposed Amended Complaint should however, conform with the Court's oral admonitions at the July 19, 1991 hearing, and should state, to the extent possible, for any antitrust claim all of the following facts:

(a) The specific identity of, and each party to, each contract, combination, or conspiracy in restraint of trade to which a non-labor group was allegedly a member, and in addition shall conform to the following:

(i) In the event that plaintiff contends any union-only project agreement or other contract is an illegal restraint of trade or part thereof, for each such agreement it shall identify to the extent possible the agreement, each of the parties to it, its terms, and shall attach the agreement, if it is in plaintiff's possession.

(ii) In the event that plaintiff contends that any combination or conspiracy to restrain trade exists apart from any contract, plaintiff shall identify each combination and conspiracy, shall identify the parties to it by name, shall describe its common scheme, and shall describe the unlawful objective.

(b) The acts each defendant performed or undertook in furtherance of each contract, combination or conspiracy.

(c) The injury to competition that resulted from each alleged contract.

(d) The geographic and product market allegedly monopolized by any defendant, and the acts each named defendant undertook to pursue monopolization of that market.

4. Insofar as the proposed pleadings attempts to allege a RICO violation, plaintiff shall attempt to conform that pleading with the Court's Standing Order re: RICO Actions served by the Court on plaintiff at the hearing on July 19, 1991.

IT IS SO ORDERED.

DATED: July 30, 1991.

EUGENE F. LYNCH
United States District Judge